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Consolidated Laws of New York
Annotated

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THE CONSOLIDATED LAWS OF NEW YORK
ANNOTATED

The books of this edition are arranged and numbered as follows:

1. Report of Consolidators and Treatise on Statutes and Statutory Construction
2. Constitution of New York Annotated, Constitution of the United States, Declaration of Independence and Magna Charta
3. Agricultural (*Repealed*)
— Agriculture and Markets (*See Farms and Markets*)
3a. Arbitration
4. Banking
5. Benevolent Orders
6. Business Corporations
7. Canal
7a. City Home Rule
7a. City Local Option (*Repealed*)
8. Civil Rights
9. Civil Service
9a. Condemnation
10. Conservation
10a. Co-operative Corporations
11. County
12. Debtor and Creditor
13. Decedent Estate
14. Domestic Relations
15. Drainage (*Repealed*)
16. Education
17. Election
18. Executive
18a. Farms and Markets (*Now Agriculture and Markets*)
— General Associations (*See Joint-Stock Association*)
19. General Business
20. General City
21. General Construction
22. General Corporation
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23. General Municipal
24. Highway
25. Indian
26. Insanity (*Now Mental Hygiene*)
27. Insurance
28. Joint-Stock Association (*Now General Associations*)
29. Judiciary
30. Labor
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32. Lien
33. Liquor Tax (*Repealed*)
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36. Navigation
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43. Public Buildings
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67. General Index

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THE CONSOLIDATED LAWS OF NEW YORK, ANNOTATED

AS AMENDED TO THE CLOSE OF THE REGULAR AND EXTRAORDINARY SESSIONS OF THE LEGISLATURE OF 1917

Compiled under the Editorial Supervision of
WILLIAM M. McKINNEY

BOOK 48
Railroad Law

EDWARD THOMPSON COMPANY
Northport, New York
1918

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JUL 30 1929

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STATE OF NEW YORK
OFFICE OF THE SECRETARY OF STATE } ss :

In pursuance of the authority vested in me, by section 932 of the Code of Civil Procedure, I, Francis M. Hugo, Secretary of State, hereby certify that the copies of the laws contained in this volume are correct transcripts of the text of the original laws, and in accordance with such section are entitled to be read in evidence.

Given under my hand and the seal of office of the Secretary of State, at the Capitol in the City of Albany, this 30th day of October, 1917.

[L. S.]

FRANCIS M. HUGO,
Secretary of State.

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The annotations in this book close with the cases reported in the following volumes:

220 New York
175 Appellate Division
97 Miscellaneous
164 New York Supplement

The Supplements will cover decisions from these points.

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RAILROAD LAW

LAWS 1910, CHAP. 481

AN ACT in relation to railroads, constituting chapter forty-nine of the consolidated laws.

Became a law June 14, 1910, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

[7]

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RAILROAD LAW

CHAPTER 49 OF THE CONSOLIDATED LAWS

Article 1. Short title (§ 1).
2. Organization, general powers and location (§§ 5–39).
3. Construction, operation and management (§§ 50–108).
4. Consolidation, lease, sale and reorganization (§§ 140–155).
5. Street surface railroads (§§ 170–*210).
6. Rapid transit act of 1875 (§§ 220–244).
7. Laws repealed; when to take effect (§§ 250, 251).

ARTICLE 1

SHORT TITLE

Section 1. Short title.

§ 1. Short title. This chapter shall be known as the "Railroad Law."

The original Railroad Law was chapter 39 of the "General Laws," being L. 1890, ch. 565. It went into the Consolidated Laws without substantial change but has been superseded by the present Railroad Law of 1910, which was reported to the legislature and passed in 1909 but not then signed by the Governor.

When chapter to take effect: see infra, § 251.

Effect of Public Service Commissions Law.—The Public Service Commissions Law and the Railroad Law were each revised and amended by the legislature of 1910 and on the same day in that year became respectively chapters 480 and 481 of the Laws of 1910 and chapters 48 and 49 of the Consolidated Laws. Various provisions of the former Railroad Law deemed to be inconsistent with the Public Service Commissions Law were omitted and the act throughout bears evidence of an attempt to harmonize it and make it consistent with the provisions of the Public Service Commissions Law. For instance section 8 of the Railroad Law declaring the power of railroad corporations begins with the words "subject to the limitations and requirements of this chapter and of the Public Service Commissions Law." Section 57 dealing with the question of rates of fare begins with the words "subject to the provisions of the Public Service Commissions Law." So that there can be no doubt that the two acts were amended and revised with reference to each other and that such portions of the Railroad Law were eliminated as were deemed to be offensive to the provisions of the Public Service Commissions Law. The two acts are to be constructed together and constitute one harmonious system applicable to the subject to which both relate. People v. Public Service Commission, (1916) 171 App. Div. 607, 156 N. Y. S. 1065, affirmed (1916) 218 N. Y. 643 mem.

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* So in original.

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ARTICLE 2

Organization, General Powers and Location

Section 5. Incorporation.
6. Supplemental certificate.
7. Payment of capital stock after filing certificate of incorporation.
8. Additional powers conferred.
9. Certificate of convenience and necessity.
10. Public service commissions may certify part of the route of a street surface railroad; power to revoke certificates; street surface railroad extensions.
11. Revocation of certificate under certain circumstances.
12. When corporate powers to cease.
13. Corporations failing to finish road.
14. Time extended.
15. Time extended where there has been a receiver.
16. Location of route.
17. Acquisition of title to real property; additions, betterments and facilities.
18. Railroads through public lands.
19. Railroads through Indian lands.
20. Railroads through Chautauqua assembly grounds.
21. Railroads along highways.
22. Proceedings to determine point at which a new railroad shall intersect one already established; compensation; duties of intersecting roads.
23. Highway exempted.
24. Change of route, grade or terminus.
25. Change of gauge.
26. Construction of part of line in another state.
27. Two roads having the same location.
28. Tunnel railroads.
29. Railroads in other countries.
30. Additional corporate powers of such road.
31. Location of principal office of such road.
32. Individual, joint-stock association, or other corporation may lay down and maintain railroad tracks in certain cases.
33. Powers of electric light and power corporations.
34. Substituted lines in certain cases.
35. Canal corporation may construct railroad.
36. Powers of such corporations.
37. Saving clause.
38. Bridge companies in cities containing more than one million inhabitants.
39. Change of time for holding elections.

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§ 5. Incorporation. Fifteen or more persons may become a corporation, for the purpose (1) of building, maintaining and operating a railroad, or (2) of maintaining and operating a railroad already built, not owned by a railroad corporation, or for both purposes, or (3) of building, maintaining and operating a railroad for use by way of extension or branch or cut-off of any railroad then existing, or for shortening or straightening or improving the line or grade of such railroad or of any part thereof, by executing, acknowledging and filing a certificate, in which shall be stated:

1. The name of the corporation.
2. The number of years it is to continue.
3. The kind of road to be built or operated.
4. Its length and termini.
5. The name of each county in which any part of it is to be located.
6. The amount of capital stock, which shall not be less than ten thousand dollars for every mile of road built, or proposed to be built, except a narrow-gauge road, when it shall not be less than three thousand dollars for every such mile.
7. The number of shares into which the capital stock is to be divided.
8. If the capital stock is to consist of common and preferred stock, the amount of each class and the rights and privileges of the latter over the former.
9. The names and post-office addresses of the directors of the corporation, not less than nine, who shall manage its affairs for the first year.
10. The place where its principal office is to be located.
11. If a street surface railroad, the names and description of the streets, avenues and highways in which the road is to be constructed.
12. If it is to be a railroad corporation, specified in article six of this chapter, the statements required by that article to be inserted in the certificate of incorporation.
13. The name and post-office address of each subscriber to the certificate and the number of shares of stock he agrees to take.

Such certificate shall have indorsed thereon, or annexed thereto, to be taken as a part thereof, an affidavit of at least three of such directors, that at least ten per centum of the minimum amount of capital stock authorized by law has been subscribed thereto, and paid in good faith and in cash to the directors named in the certificate, and that it is intended in good faith to build, maintain and operate the road mentioned therein. In case of a railroad corporation specified in article six of this chapter, the affidavit of the directors shall show that the full amount of such capital stock has been in good faith subscribed, and there shall be annexed to

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the certificate of incorporation and as a part thereof the certificate of the public service commission showing the organization of the corporation for the purposes mentioned in the certificate.

The filing of every certificate, where the amount of stock required by this section has not been in good faith subscribed and paid in cash, shall be void.

This section was derived from the Railroad Law of 1890, § 2, as amended by L. 1892, ch. 676; L. 1905, ch. 727, § 1.

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I. In General

Term "certificate of incorporation": see General Corporation Law, § 3, subd. 7.

Extension of corporate existence: see General Corporation Law, § 37.

When corporate powers to cease: see infra, § 12.

Qualifications of incorporators: see General Corporation Law, § 4.

Corporate names: see General Corporation Law, § 6.

Change of name of railroad to be approved by public service commission: see General Corporation Law, § 60.

Railroad company as resident of county when any portion of its road is therein: see Code Civ. Pro., § 341.

Filing and recording certificates of incorporation: see General Corporation Law, § 5.

Classification of railroads as stock corporations: see General Corporation Law, § 2.

Stock and stockholders generally: see Stock Corporation Law, § 50 et seq.

Term "office of a corporation": see General Corporation Law, § 3, subd. 9.

Railroad within New York city.—This section is general in its application and under it may be incorporated a railroad in part within the limits of the city of New York. People v. Board of Com'rs, (1903) 81 App. Div. 242, 81 N. Y. S. 20, affirmed (1903) 175 N. Y. 516, 67 N. E. 1088.

Street railway.—This section authorizes the incorporation of a street railway. Schenectady R. Co. v. Peck, (1903) 88 App. Div. 201, 84 N. Y. S. 759.

Filing several certificates.—It seems that it is not improper to file several certificates exactly alike except that each is signed by different persons, all being construed together as one certificate executed by all the signers. Lake Ontario, etc., R. Co. v. Mason, (1857) 16 N. Y. 451.

Amended certificate.—Where a certificate is defective and void what purports to be an amended certificate may be treated as an original if it contains the requisites of an original. People v. Board of Com'rs, (1903) 81 App. Div. 242, 81 N. Y. S. 20, affirmed (1903) 175 N. Y. 516, 67 N. E. 1088.

Subscribers.—The use of the pronoun "he" in subdivision 13 does not require that all subscribers be individuals, and a partnership subscription in the firm name is good. Ogdensburgh, etc., R. Co. v. Frost, (1856) 21 Barb. 541. It seems that a corporation may sign by an agent and that a certificate so signed is not defective if the agent was properly authorized. Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27, affirming 35 Hun 220.

Acknowledgment.—An acknowledgment of some of the signers before a fellow incorporator is a nullity and cannot be made the basis of a valid certificate. People v. Board of R. Com'rs, (1905) 105 App. Div. 273, 93 N. Y. S. 584. And even if the acknowledgment may be made by a witness, instead of by the persons executing the certificate, one cannot acknowledge as a subscribing witness where he did not sign the certificate as a subscribing witness but did sign as an incorporator. People v. Board of Com'rs, (1902) 75 App. Div. 106, 77 N. Y. S. 380.

Certificate of convenience.— Even after a compliance with the section the corporation does not come into existence until section 9 has been complied with and a certificate of convenience and necessity has been procured. People

v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861. But see Muehlenbeck v. Babylon, etc., R. Co., (1899) 26 Misc. 136, 55 N. Y. S. 1023.

Individual ownership of railroad.—The provision that a corporation may be formed for the purpose of maintaining and operating a railroad already built, not owned by a railroad corporation, indicates that an individual may take and own a franchise to operate a railroad. Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1066, reversing 123 App. Div. 93, 108 N. Y. S. 255.

Number of directors.— Under the Railroad Law of 1850, providing that the number of directors should be thirteen, and L. 1864, ch. 582, as amended by L. 1883, ch. 46, providing that a company whose road did not exceed twenty miles might have a board of seven directors, it was ruled that such a railroad was required to have a board of either thirteen or seven directors. Op. Atty.-Gen. (1889) 152.

Cited.—This section was cited in People v. State Board of Tax Com'rs, (1914) 160 App. Div. 771, 146 N. Y. S. 112; People v. United Traction Co., (1911) 145 App. Div. 645, 130 N. Y. S. 477 (per Betts, J., dissenting); Frontier v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627. Subdivision 8 was cited in Continental Securities Co. v. New York Cent., etc., R. Co., (1916) 217 N. Y. 519, 111 N. E. 484; Op. Atty.-Gen. (1902) 251.

II. Route and Length

Location of route: see infra, § 16.

Meaning of "located" as applied to railroad: see Ann. Cas. 1912C 1309, note.

Judicial notice of location of railroad: see 12 Ann. Cas. 938.

Designation of route.— "It was not the intention of the General Railroad Act that thereunder a company might be formed for the general purpose of constructing a railroad or railroads, or at some place or on some route left at the time of the incorporation unspecified, or to be thereafter or otherwise fixed or determined." A contrary intention is evidenced by the requirements as to the contents of the certificate of incorporation. Webb v. Forty-second St., etc., R. Co., (1881) 52 Misc. 46, 102 N. Y. S. 762. But this section requires the certificate of incorporation merely "to state the termini and length of the road and the counties through which the same is to run." People v. Public Service Commission, (1916) 171 App. Div. 366, 156 N. Y. S. 1023. "The general termini and route must be stated in the articles of association, but the location in other respects, including the precise termini and the intermediate points, the legislature has left to the election of the company after it has surveyed and ascertained which is the most feasible line." Rochester, etc., R. Co. v. New York, etc., R. Co., (1887) 44 Hun 206, 8 N. Y. St. Rep. 237, affirmed (1888) 110 N. Y. 128, 17 N. E. 680.

Length.— Formerly the certificate was required to state the length of the road "as near as may be," and it was held that an estimate was all that was required, as the act contemplated incorporation before any survey was made. Buffalo, etc., R. Co. v. Hatch, (1859) 20 N. Y. 157.

Streets and highways traversed.— The requirement of subdivision 11 was stated in People v. Board of R. Com'rs, (1904) 92 App. Div. 126, 87 N. Y. S. 334.

III. Subscriptions to Stock

In general.—This section recognizes and treats as obligatory, on the incorporation of a railroad, stock subscriptions theretofore made. Lowville, etc., R. Co. v. Elliott, (1906) 115 App. Div. 884, 101 N. Y. S. 328, affirmed (1909) 196 N. Y. 545 mem.

Certificate as conclusive of length.—The length stated in the certificate is that which determines whether subdivision 6 is complied with, it seems, except in a direct attack by the state. Buffalo, etc., R. Co. v. Hatch, (1859) 20 N. Y. 157. Even where a survey presented on an application for a certificate of convenience and necessity shows a road longer than that stated in the certificate the estimated length in the certificate controls as to the sufficiency of the subscriptions, where the certificate of necessity grants authority to construct the road described in the certificate of incorporation. People v. Board of R. Com'rs, (1904) 99 App. Div. 85, 91 N. Y. S. 375.

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Subscription of foreign corporation.—The subscription of a foreign corporation, a part of which has been paid, is not per se void so as to invalidate the incorporation of a railroad, in the absence of proof of the want of power of the corporation to subscribe. Matter of Rochester, etc., R. Co., (1880) 110 N. Y. 119, 17 N. E. 678.

Secret agreements.— So far as subscriptions to stock are concerned the fact that subscribers had a private oral understanding with the person soliciting subscriptions that they should not be called upon for payment, being invalid in law, does not affect the validity of the incorporation. Beattys v. Salon, (1892) 64 Hun 120, 19 N. Y. S. 37, modified (1893) 136 N. Y. 662, 32 N. E. 1062. And see Syracuse, etc., R. Co. v. Gere, (1875) 4 Hun 392, holding such an agreement void.

IV. Payment of Capital

Necessity of payment.— "The penalty which the law prescribes for a failure to pay at least ten per cent of the subscriptions to the capital stock in cash is to render the filing of any certificate void. . . . There is no qualification in favor of an inadvertent act, and no saving clause for failure however occasioned. The requirement is imperative, the penalty absolute." Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004. The payment in good faith and in cash of ten per cent of the capital stock, as required by this section, is essential and "affects the lawfulness of any corporate undertaking." People v. Public Service Commission, (1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. Y. S. 968. Where this provision is not complied with the corporation does not exist de jure. Farnham v. Benedict, (1887) 107 N. Y. 159, 13 N. E. 784, reversing 39 Hun 22.

Amount required.— The cash paid in need not be distributed to each share; all that is required is that the cash paid in shall equal ten per cent of the minimum amount of capital stock required. Ogdensburgh, etc., R. Co. v. Frost, (1856) 21 Barb. 541.

Person receiving payment.— Even before provision was made that the affidavit should show that the directors were the ones to whom payment had been made, it was held that necessarily they were the ones to whom payment was required to be made. Buffalo, etc., R. Co. v. Hatch, (1859) 20 N. Y. 157.

Neglect to file affidavit.— Where no affidavit as to the payment in cash of the capital is annexed to the certificate the persons executing the certificate nevertheless become a de facto corporation. Matter of New York, etc., R. Co., (1908) 193 N. Y. 72, 85 N. E. 1014, reversing 126 App. Div. 909, 110 N. Y. S. 1139.

Question fact of payment.— The affidavits as to the payment of ten per cent of the capital stock are not conclusive but the fact of actual payment may be inquired into on an application to the Public Service Commission for a certificate of convenience and necessity. People v. Public Service Commission, (1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. Y. S. 968; People v. Public Service Commission, (1908) 127 App. Div. 480, 112 N. Y. S. 133; Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004. The question whether the certificate is regular is also open to question in such a proceeding. People v. Board of R. Com'rs, (1902) 57 App. Div. 106, 77 N Y. S. 380. Accordingly where a certificate of convenience and necessity has been issued this shows prima facie that the incorporation was regular. Erie, etc., R. Co. v. Brown, (1907) 57 Misc. 164, 107 N. Y. S. 983, affirmed (1908) 123 App. Div. 655.

What constitutes payment generally.— Payment in good faith and in cash implies a payment in money delivered by subscribers to apply on their subscriptions the title to which will pass to the corporation on incorporation. Buffalo, etc., R. Co. v. Hatch, (1859) 20 N. Y. 157.

Check.— An uncertified check which has not been presented for payment is not cash as the deposit may still be withdrawn by the drawer, so that an affidavit based on such a payment is false. People v. Board of R. Com'rs, (1903) 81 App. Div. 242, 81 N. Y. S. 20, affirmed (1903) 175 N. Y. 516, 67 N. E. 1088; Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004. See, however, Syracuse, etc., R. Co. v. Sere, (1875) 4 Hun 392. And checks given on banks in which the makers or drawers have no funds, under an agreement that they shall not be presented for payment, cannot be treated as cash. Farnham v. Benedict, (1887) 107 N. Y. 159, 13 N. E. 784, reversing 39 Hun 22. However, a certified check paid and received as cash may be

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treated as a payment in good faith and in cash. Matter of Staten Island Rapid Transit R. Co., (1885) 37 Hun 422, affirmed (1886) 101 N. Y. 636.

Deposit in bank.— A deposit with a solvent banker to the credit of the proposed corporation is a payment in cash though the banker is not required to keep the identical money on hand by reason of paying interest for its use. Matter of Wood, (1904) 99 App. Div. 334, 91 N. Y. S. 225, affirmed (1905) 181 N. Y. 93. However, the mere deposit of money in a bank to the credit of the directors of a proposed railroad is not a good faith payment if there exists any agreement or obligation which will prevent the corporation from the free use of the money after incorporation. People v. Public Service Commission, (1908) 127 App. Div. 480, 112 N. Y. S. 133. A finding that ten per cent of the capital stock was not paid in good faith and in cash is justified where it appears that certain persons procured the money on a demand note, made their check therefor to the order of the directors who indorsed the same to a third person who delivered the same to the bank in payment of the note, the whole transaction occurring in twenty minutes. People v. Public Service Commission, (1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. Y. S. 968.

§ 6. Supplemental certificate. If the names and places of residence of the directors of the corporation have been omitted from the certificate, when executed and acknowledged, and thereafter the requisite number of directors has been chosen at a meeting of the subscribers to the certificate, a supplemental certificate, containing their names and places of residence, may be filed with such certificate with the same force and effect as if the names and places of residence of the directors had been originally inserted therein.

This section was derived from the Railroad Law of 1890, § 3.

Amended and supplemental certificates: see GENERAL CORPORATION LAW, § 7.

§ 7. Payment of capital stock after filing certificate of incorporation. Where it does not appear by the affidavit indorsed on or annexed to any certificate of incorporation, or articles of association of any railroad company, filed under the laws of this state, that the amount of capital stock required by the provisions of said laws to be paid in good faith and in cash to the directors named in such certificate or articles has been so paid, or where the affidavit required by law is omitted, and where such payment has been made to the directors named in said certificate or articles, or any of them, for the use of the company prior to the fifteenth day of May, nineteen hundred and three, an affidavit of at least three of the directors named in said certificate or articles, stating that prior to said fifteenth day of May, nineteen hundred and three, at least the amount of capital stock of such corporation required by the law in force at the time of filing said certificate or articles to be subscribed thereto, has been subscribed for in good faith and that the amount required by the law in force at the time of filing said certificate or articles to be paid on subscriptions in good faith and in cash to the directors named in the certificate or articles has been paid in cash and in good faith to the directors named

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in said certificate or articles, or any of them, for the use of said corporation and that it is intended in good faith to build, construct, maintain and operate the road mentioned in said certificate or articles, may be filed in the office of the secretary of state, which affidavit shall be annexed to said certificate or articles and upon such filing said certificate or articles, shall for all purposes have the same force and effect as if an affidavit in all respects regular and in conformity with law had been annexed to said certificate or articles when said certificate or articles were filed and as if a subscription and payment in all respects sufficient and in conformity with law had been made to the directors named in the certificate or articles, prior to the original filing of said certificate or articles and said certificate or articles and the original filing thereof shall be and be deemed valid from the time of such original filing and such corporation shall be and be deemed a valid corporation from said time of original filing and shall now and hereafter have all the rights, privileges, powers and franchises to which if a valid corporation it would have been entitled by law at the time of such original filing together with such other rights, privileges, powers and franchises as have been since or may hereafter be granted by law to such valid corporations, provided that nothing herein contained shall affect or impair any vested right. A copy of said certificate or articles with a copy of said affidavit hereinabove authorized, certified to be a copy by the secretary of state or his deputy shall in all courts and places and for all purposes be presumptive evidence of the incorporation of such corporation and of the facts stated in said certificate or articles and affidavit. This section shall not apply to or affect any street surface railroad company the route of which in whole or in part lies within any city of the first or second class in this state, and shall not apply to or affect any railroad corporation incorporated under any private or local act.

This section was derived from L. 1893, ch. 238, § 1, as amended by L. 1903, ch. 627, § 1.

Constitutional restrictions on laws governing street railroads: see CONSTITUTION, Art. III, § 18.

Subscriptions to stock and time of payment therefor: see STOCK CORPORATION LAW, §§ 53, 54.

Intent of legislature.— The intention of the legislature was "to place companies, which through inadvertence had fallen into error in the filing of their articles of incorporation, in the same position as if the articles had been property filed, subject to all the advantages and disadvantages, rights gained and losses incurred thereby. To hold otherwise would give to companies whose articles of association were defective a positive advantage over those who had complied with the statute. It would relieve such companies from a compliance with all of the requirements which the legislature in subsequent years has deemed wise to enact for the protection of the public, and at the same time relieve them from the rights of creditors to have its property, road and franchise sequestered for their benefit. Such an intent should not be imputed to the legislature." Matter of New York, etc., R. Co., (1908) 193 N. Y. 72, 85 N. E. 1014, reversing 126 App. Div. 909, 110 N. Y S. 1139.

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Retroactive effect of compliance.— Where a defect is cured under this section the corporation is nevertheless required to secure a certificate of convenience and necessity, though no such requirement was in existence when the certificate of incorporation was filed. Matter of New York, etc., R. Co., (1908) 193 N. Y. 72, 85 N. E. 1014, reversing 126 App. Div. 909, 110 N. Y. S. 1139.

§ 8. Additional powers conferred. Subject to the limitations and requirements of this chapter and of the public service commissions law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

1. *Entry upon lands for purposes of survey.* To cause the necessary examination and survey for its proposed railroad to be made for the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon any lands or waters subject to liability to the owner for all damages done.

2. *Acquisition of real property.* To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction, maintenance and accommodation in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence.

3. *Construction of road.* To lay out its road not exceeding six rods in width, and to construct the same; and, for the purpose of cuttings and embankments, to take such additional lands as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, upon making compensation therefor.

4. *Intersection of streams, highways, plank-roads, turnpikes and canals.* To construct its road across, along or upon any stream, water-course, highway, plank-road, turnpike, or across any of the canals of the state, which the route of its road shall intersect or touch.

5. *Intersection of other railroads.* To cross, intersect, join, or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its connections.

6. *Buildings and stations.* To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

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7. *Transportation of persons and property.* To take and convey persons and property on its railroad by the power or force of steam or of animals, or by any mechanical power, except where such power is specially prescribed in this chapter, and to receive compensation therefor.

8. *Time and manner of transportation.* To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor.

9. *Purchase of lands and stock in other states.* To acquire and dispose of any real property in any other state through which any part of its railroad is operated, and stock in any foreign corporation owning lands in another state for the purpose of securing for such railroad corporation in this state a permanent supply of fuel for its use, and stock of corporations in this state, formed for the purpose of erecting union railroad depots.

10. *Creation of mortgage.* From time to time to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid, notwithstanding any limitation on such power contained in any general or special law. But no mortgage, except purchase-money mortgages, shall be issued by any railroad corporation under this chapter or any other law without the consent of the public service commission, and the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing, and shall be given and certified and be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, as provided in section six of the stock corporation law; or else the consent of the public service commission and the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his post-office address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office, and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section six of the stock corporation law. When authorized by the stockholders' consent to any bonds made or issued under this section, the directors, under such regulations as they may adopt, may

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confer on the holder of any such bonds the right to convert the principal thereof, after two and not more than twelve years from the date of the bond, into stock of the corporation at a price fixed by the board of directors, which may be either par or a price not less than the market value thereof at the date of such consent to such bonds; and if the capital stock shall not be sufficient to meet the conversion when made, the board of directors shall authorize an increase of capital stock sufficient for that purpose.

This section was derived from the Railroad Law of 1890, § 4, as amended by L. 1892, ch. 676; L. 1902, ch. 504, § 1.

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I. In General

Grant of general corporate powers: see General Corporation Law, § 11.

Purchase of stock of other corporations: see Stock Corporation Law, § 52.

What business a railroad company may conduct as incidental to its main business: see notes, 4 Ann. Cas. 910; 13 Ann. Cas. 293.

Legislative power.—The powers granted by this section "are justified on the ground that, when exercised, they are the acts of the government performed indirectly through the medium of a corporate body. It follows, of course, that the legislature has control over it and may compel the exercise of its functions and direct the management of its business and use of the road as in their judgment will best subserve the public interest." People v. New York, etc., R. Co., (1887) 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Foreign corporation.— The term "every railroad corporation" includes foreign railroad corporations authorized by special acts of the legislature to construct lines of railroad within this state. New York, etc., R. Co. v. Welsh, (1894) 143 N. Y. 411, 38 N. E. 378, 42 A. S. R. 734.

Elevated railroad.—An elevated railroad corporation is within this section. Manhattan R. Co. v. Astor, (1907) 56 Misc. 353, 107 N. Y. S. 666.

"Route" of road.— Subdivisions 1 and 3 have been said to indicate that the route of a railroad is confined to the strip of land on which the road is laid out and built. Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169 (per Vann, J., dissenting).

Cited.— This section was cited in People v. Public Service Commission, (1916) 171 App. Div. 607, 156 N. Y. S. 1035, affirmed (1916) 218 N. Y. 643 mem.; Lehigh Val. R. Co. v. Canal Board, (1910) 69 Misc. 251, 125 N. Y. S. 227, affirmed (1911) 146 App. Div. 151, modified (1912) 204 N. Y. 471.

II. Survey and Construction

Location of route: see infra, § 16.

Compensation for survey.— Subdivision 1 in authorizing an entry for purposes of making a survey without providing for payment of compensation is not unconstitutional. Polly v. Saratoga, etc., R. Co., (1850) 9 Barb. 449. And see Bloodgood v. Mohawk, etc., R. Co., (1837) 18 Wend. 9, 31 Am. Dec. 313.

Scope of subdivision 3.— Subdivision 3 relates only to the original construction of a railroad. Matter of New York Cent., etc., R. Co., (1873) 67 Barb. 426.

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Estate or interest acquired by railroad in land purchased for right of way under state statute: see Ann. Cas. 1917B, 689, note.

Uses to which right of way may be devoted: see 36 L. R. A. (N. S.) 513, note.

Condemnation or grant of land for right of way as carrying right to lateral and subjacent support: see 32 L. R. A. (N. S.) 155, note.

Acquisition of title to land within right of way by adverse possession or prescription: see notes, 2 Ann. Cas. 718; 10 Ann. Cas. 1001; Ann. Cas. 1916D 1186.

Acquisition of prescriptive right of way across railroad tracks: see 35 L. R. A. (N. S.) 190, note; 48 L. R. A. (N. S.) 903, note.

Right of railroad company to condemn water over which right of way is constructed: see Ann. Cas. 1916D, 1215, note.

Condemnation of land for spur track to private establishment: see notes, 7 Ann. Cas. 835; 13 Ann. Cas. 1012; Ann. Cas. 1912D 234.

Measure of damages for right of way for telegraph or telephone line on railroad right of way: see L. R. A. 1916E, 582, note.

Right to carry wires across railroad: see L. R. A. 1915B, 823, note.

Power of telegraph or telephone company to condemn railroad right of way under state statute: see Ann. Cas. 1917B, 689, note.

What constitutes notice to railroad company of adverse possession of its property: see Ann. Cas. 1917A, 1274, note.

Right of railroad company to challenge powers or privileges of rival: see L. R. A. 1916B, 1087, note.

Right to dower in land conveyed to or condemned by railroad: see 21 Ann. Cas. 491, note.

III. Acquisition of Real Property

Acquisition of title to real property: see infra, § 17.

Acquisition of additional real property: see General Corporation Law, § 13.

Acquisition of property outside of state: see General Corporation Law, § 14.

Public nature of use.— "The public have an interest in the use of a railroad, and in the proper performance of every power within the franchise conferred upon a railroad corporation and hence every facility needed by such corporation is for public purposes, and whatever is required to enable the corporation to perform its duty to the public is within the principle which permits a delegation of power to it. The right of eminent domain, which is but a right of the people or government to resume the possession of lands for public use, and subject to which right property is always held, may be delegated to individuals, corporations or municipalities for like use, and that the construction and operating of a railroad is such a use as justifies a delegation of this right is now beyond question, and is not open for consideration." New York, etc., R. Co. v. Kip, (1871) 46 N. Y. 546, 7 Am. Rep. 385.

Purpose of acquisition generally.— The only limit to the power to acquire lands "is the reasonable necessity of the corporation in the discharge of its duty to the public. This necessity includes the acquisition of land and accommodations for all depots and buildings convenient and proper for the storing and keeping of its cars and locomotives when not used; for the receipt, delivery, storing and safe keeping of freight and property, as well as such facilities as are usually required in operating the road; the successful prosecution of its business; the general purposes of the corporation, and the design in contemplation by the legislative grant." Matter of New York Cent., etc., R. Co., (1879) 77 N. Y. 248. In New York, etc., R. Co. v. Kip, (1871) 46 N. Y. 546, 7 Am. Rep. 385, Allen, J., after stating that the right to take land for some purposes which are named is not included in the grants, proceeds to say that "passenger depots, convenient and proper places for the storing and keeping of cars and locomotives not in use, . . . for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating of the railroad to the proper prosecution of the business in the interests of the public. They

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may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant." The rule here laid down furnishes a broad field for the exercise of powers which the statute confers, and if it appears that the acquisition of property is demanded for the legitimate purpose for which land is to be taken are strictly within its charter. Where a reasonable necessity is shown a reasonable discretion must be exercised and the courts will not interfere to control that discretion unless it will result in great injury or is influenced by some improper motive. New York Cent., etc., R. Co. v. Metropolitan Gaslight Co., (1875) 63 N. Y. 326. "A railroad corporation has no capacity to acquire lands for any purpose except such as is defined in its charter. It may take and hold lands for railroad purposes, but it is not necessary to cite authorities to show that it could engage in no business, and come plainly within the scope of its charter. Being a creature of law, it possesses those properties only which its charter confers upon it, either expressly or as incidental to its existence." Rumsey v. New York, etc., R. Co. (1889) 114 N. Y. 423, 21 N. E. 1066.

Presumption as to purpose.— Lands acquired by a railroad by deed will be presumed to have been acquired for the construction and operation of its road. Yates v. Van De Bogert, (1874) 56 N. Y. 526.

Prospective needs.— "It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement, and it is therefore well settled in this state that the mere fact that land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party is not necessarily a defense to a proceeding to condemn it. The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain not only from individuals, but also from the state for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt." Matter of Staten Island Rapid Transit Co., (1886) 103 N. Y. 252, 8 N. E. 548. To like effect see Matter of New York Cent., etc., R. Co., (1879) 77 N. Y. 248. When, however, prospective needs are the basis of a proposed condemnation it should be established beyond a reasonable doubt that the increased business will occur, and the execution of collateral undertakings by another, not yet commenced, are entitled to but little weight. Rensselaer, etc., R. Co. v. Davis, (1870) 43 N. Y. 137.

Transmission line.— The construction of a line of poles and wires to furnish electricity to an existing electric railway does not fall within subdivision 2, but within section 17. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791.

Stairways for elevated railroad.—An elevated railway may acquire lands for additional stairways under this section. Manhattan R. Co. v. Astor, (1907) 56 Misc. 353, 107 N. Y. S. 666.

Highway to private property.—A railroad cannot acquire by condemnation lands which it desires to use for a highway from a depot to a hotel patronized by its passengers, or for a storage place for pleasure boats belonging to its patrons, or for use in cutting ice from waters to be used for private consumption. In re Rochester, etc., R. Co., (1890) 58 Hun 601 mem., 12 N. Y. S. 566.

Warehouse.—A railroad has power to acquire lands for a warehouse in which to store property awaiting delivery or shipment, as well as for piers or docks at which to deliver and receive freight carried by water. Matter of New York Cent., etc., R. Co., (1879) 77 N. Y. 248.

Restoration of highway.—A railroad has power to acquire lands necessary to restore a highway which it crosses or along which it passes, as such acquisition "is necessary for the construction, maintenance and accommodation of its railroad." People v. Dutchess, etc., R. Co., (1874) 58 N. Y. 152.

Cut off.— Subdivision 2 affords no authority for a railroad already constructed and in operation to divert its line over a short cut which in realty constitutes a change of route. Erie R. Co. v. Steward, (1902) 170 N. Y. 172, 63 N. E. 118, affirming 61 App. Div. 480, 70 N. Y. S. 698. Such authority is now conferred, however, by section 17. Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169.

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Switch to private lands.— Lands may be condemned to be occupied by tracks necessary to be laid to accommodate cattle trains and provide access to a stock yard, though it is proposed to install an abattoir in connection with the stock yard and lease the same to a private corporation. New York Cent., etc., R. Co. v. Metropolitan Gaslight Co., (1875) 63 N. Y. 326.

Accommodation of foreign traffic.— The fact that the need of additional land for increased facilities is made necessary by a traffic arrangement with a foreign railroad corporation to whose benefit it will largely inure is no bar to a proceeding to acquire the additional lands. Matter of Staten Island Rapid Transit Co., (1886) 103 N. Y. 251, 8 N. E. 548.

Condemnation by foreign corporation.— Subdivision 2 authorizes a foreign railroad corporation, authorized by a special statute to construct and operate a railroad in this state, to condemn necessary lands and as so construed the subdivision is not unconstitutional. New York, etc., R. Co. v. Welsh, (1894) 143 N. Y. 411, 38 N. E. 378, 42 A. S. R. 734.

Condemnation by lessor railroad.— The necessity for additional lands for railroad purposes, and the power to acquire the same, survives in favor of a lessor railroad after it has leased its road for a long term, and this is true though the lessee is a foreign corporation. Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27; Kip v. New York, etc., R. Co., (1876) 67 N. Y. 227.

Condemnation of lands held under lease.— The fact that a railroad is the lessee of lands does not preclude it from acquiring its lessor's title by condemnation. Kip v. New York, etc., R. Co., (1876) 67 N. Y. 227. This is true, for example, where permanent improvements are necessary to be erected on the lands. New York, etc., R. Co. v. Kip, (1871) 46 N. Y. 546, 7 Am. Rep. 385.

Acquisition of property devoted to public use.— "The general authority conferred upon railroad corporations to acquire lands against the will of the owner is broad and comprehensive. In terms it covers all and excepts none. But because it could not be intended that the state, having authorized one taking whereby the lands become impressed under authority of the sovereign with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use unless it so specifically decreed it has been ruled that lands so held and impressed with a public trust were not embraced in words of general authority. Were the rule otherwise this evil would result: a corporation, number one, having the right of eminent domain, takes land from a similar corporation, number two, having the same right; number two thereupon proceeds again to condemn it for its own use and number one retaliates, and so the absurd process goes on. It is clear that the legislature never meant any such result, and hence, from any general grant containing in its terms no word of exception, there is necessarily excepted property already held upon a public trust by the authority and under the ward and control of the state." Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27. See also People v. Thompson, (1885) 98 N. Y. 6; Matter of New York, etc., R. Co., (1880) 20 Hun 201; Op. Atty.-Gen. (1891) 186. The rule that property already devoted to a public use cannot be condemned does not, however, prevent a railroad, with the consent of local authorities, from acquiring the right to use a street though such use to some extent interferes with the public user. Matter of New York Cent., etc., R. Co., (1879) 77 N. Y. 248. And immunity from condemnation proceedings by a railroad does not exist in favor of a steamboat company having a charter imposing on it no duties as a common carrier, though it is voluntarily engaged in business as a common carrier. Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27. Likewise a gas company engaged in furnishing gas to the public is not such a public corporation as to exempt its lands from condemnation for railroad purposes. New York Cent., etc., R. Co. v. Metropolitan Gaslight Co., (1875) 63 N. Y. 326. The existence of a mere temporary switch of another railroad on premises, obviously constructed for purposes of obstruction, presents no bar to the acquisition of the premises for railroad purposes. Matter of Rochester, etc., R. Co., (1888) 110 N. Y. 119, 17 N. E. 678.

Title acquired by deed.— Under an absolute conveyance of lands to a railroad corporation its title is not limited to the time of its use for railroad purposes and it may dispose of the same in like manner as an individual

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might do. Kenney v. Wallace, (1881) 24 Hun 478; Yates v. Van De Bogert, (1874) 56 N. Y. 526. Where no words of limitation are used in a deed to a railroad it takes a fee and not a term limited by the term of its corporate existence. Nicoll v. New York, etc., R. Co., (1854) 12 N. Y. 121.

Title acquired by condemnation.— "The title usually acquired by condemnation proceedings, although not a fee simple absolute, is technically designated and described as a base or terminable fee. . . . The interest acquired is greater than a right of passage, is more than an easement, is special and exclusive and has the substantiality of a fee, and becomes the private property of the railroad corporation." People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting). The title acquired by condemnation, as limited by subdivision 2, has been described as follows: "The interest of the defendant in this strip of land was a permanent easement for the uses and purposes of its railroad. (Citing authorities.) While this easement exists the defendant is entitled to the exclusive use, possession and control of the land and the owner of the fee has no right to use, occupy, or interfere with the same in any manner whatever. While it has been held in some cases that the owner of the fee, subject to the railroad easement, has some right to use the land taken not inconsistant with the easement the better view of the law, supported by the greater weight of authority, is that the use of the railroad company while the easement exists is exclusive of the owner of the fee." Roby v. New York Cent., etc., R. Co., (1894) 142 N. Y. 176, 36 N. E. 1053, reversing 65 Hun 532, 20 N. Y. S. 551, quoted with approval in Hudson, etc., R. Co. v. Wendel, (1908) 193 N. Y. 166, 85 N. E. 1020, affirming 122 App. Div. 917, 107 N. Y. S. 1130. The owner of the fee has no right to use the land taken, the railroad's right being exclusive, and the possession of the railroad is such that it may ripen into a title by adverse possession. Long Island R. Co. v. Mulry, (1914) 212 N. Y. 108, 105 N. E. 806, Ann. Cas. 1915D 298. The easement of a railroad under subdivision 2 is not lost because the only use made of a track laid on the land is to deliver coal to one to whom the land has been leased, where the lease reserves the track to the railroad for railroad uses. Roby v. New York Cent., etc., R. Co., (1894) 142 N. Y. 176, 36 N. E. 1053, reversing 65 Hun 532, 20 N. Y. S. 551. The provision of subdivision 2 as to the nature of the title acquired by condemnation applies to a corporation organized under section 5 which acquires land for the construction of a railroad under the Rapid Transit Act. (Section 220 et seq.) Hudson, etc., R. Co. v. Wendel, (1908) 193 N. Y. 166, 85 N. E. 1020, affirming 122 App. Div. 917, 107 N. Y. S. 1130.

Riparian ownership.— Where a railroad acquires lands merely for use as a right of way adjoining a navigable river it is not an adjacent owner in the full sense of the term and was not such an owner that a state grant of the title to lands under water could be made to it under early statutes providing for such grants to adjacent owners. Rumsey v. New York, etc., R. Co., (1889) 114 N. Y. 423, 21 N. E. 1066.

IV. Intersection of Streams and Highways

Railroads along highways: see infra, § 21.

Proceedings to determine point at which new railroad shall intersect one already established: see infra, § 22.

Powers of superintendent of public works with reference to railroads near canals: see Canal Law, § 35.

Occupation of turnpike.— "Subdivision 4 has not been and cannot be so construed as to authorize a railroad corporation to enter upon and permanently occupy or seriously to injure a turnpike or plank road company who hold and enjoy their franchises and property under an authority of the legislature, equally valid and sacred as that which confers similar rights and privileges on railroad companies. On the contrary, this section is a clear manifestation of a legislative intention to protect the rights of turnpike and plank road corporations against intrusion and violence by railroad companies. Railroad companies are authorized to intersect or touch them only on condition that they shall not unnecessarily impair their usefulness to the owners. . . . A railroad company is empowered to construct its lines across, along or upon any stream of water, water-course, street, highway,

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plank road, turnpike or canal, which the route of its road shall intersect or touch; but this statute is construed as granting only the right which the public had in these streams of water, water-courses, streets, highways, plank roads, turnpikes and canals, and not as attempting to grant any right to violate private property without the consent of the owners." Ellicottville, etc., Plank Road Co. v. Buffalo, etc., R. Co., (1855) 20 Barb. 644.

Crossing canal.— It seems that subdivision 4 does not empower a railroad to cross a state canal on any bridge it may see fit to build, but that the place and manner of crossing may be designated by the duly constituted authorities. Birmingham v. Rochester, etc., R. Co., (1893) 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764. The superintendent of public works has power to grant permission to a railroad for construction within the ten rod limit of canals. Op. Atty.-Gen. (1911) 181. In constructing a new highway bridge across the canal the state is not bound to provide for more tracks than are on the present structure and the superintendent of public works may prescribe the terms on which the bridge may be used. Op. Atty.-Gen. (1907) 336. Subdivision 4 must be construed in connection with sections 18 and 21, infra, and section 35 of the Canal Law, and hence the consent of the superintendent of public works is essential. Op. Atty.-Gen. (1905) 297. Subdivision 4 was cited as the source of right to cross a canal in People v. Walsh, (1914) 211 N. Y. 90, 105 N. E. 136, reversing 159 App. Div. 252, 144 N. Y. S. 367.

Crossing stream.— The right to cross a stream here conferred necessarily refers to a navigable stream, for the state has no control over private water-courses. Lehigh Val. R. Co. v. Canal Board, (1911) 146 App. Div. 151, 130 N. Y. S. 978. It has been said that under subdivision 4 a railroad may be constructed across a river without the consent of the commissioners of the land office. People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting). It seems that the authority to construct a railroad across a stream is a sufficient license for the setting of piers of a railroad bridge in the bed of the stream where that is reasonably necessary and such piers do not unnecessarily impair the usefulness of the river. Lehigh Val. R. Co. v. Canal Board, (1910) 69 Misc. 251, 125 N. Y. S. 227, affirmed (1911) 146 App. Div. 151, modified (1912) 204 N. Y. 471. In the case of a bridge over a creek navigated by steam or sail boats the consent required by section 21 must be obtained. People v. Delaware, etc., Co., (1914) 213 N. Y. 194, 107 N. E. 506, Ann. Cas. 1916C 1009. Subdivision 4, which is derived from L. 1890, ch. 565, does not contain the exception previously existing denying the right to obstruct any navigible stream or lake, but it does not operate retroactively to divest rights previously existing. Rumsey v. New York, etc., R. Co., (1891) 130 N. Y. 88, 28 N. E. 763.

Use of highway as route.— This section does not contemplate the occupation of a highway as the entire route of a railroad but only a casual or incidental occupation thereof. Burt v. Lima, etc., R. Co., (1892) 21 N. Y. S. 482.

Franchise to occupy street.— "The provision of subdivision 4 of section 4 of the Railroad Law . . . granting to railroad corporations the right to construct their roads across, along or upon highways may fairly be construed as a grant to cross streets thereafter opened, and such a grant is a franchise" within the Tax Law. New York Cent., etc., R. Co., v. Woodbury, (1910) 74 Misc. 130, 133 N. Y. S. 135; People v. Woodbury, (1911) 70 Misc. 261, 127 N. Y. S. 201.

Exclusive nature of rights.— A railway on a highway does not own the same and telephone wires may be permitted to be constructed across the highway under the tracks. Op. Atty.-Gen. (1908) 359.

Consent of local authorities.— Where a railroad proposes to occupy a highway it must comply with section 21, while section 171 governs in case of a street surface railway. Hornell, etc., R. Co., v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845; Delaware, etc., R. Co. v. Syracuse, (1907) 157 Fed. 700. It seems that subdivision 4 does not authorize the crossing of streets of the city of New York or Brooklyn by an elevated railway, at least without the consent of the local authorities. Matter of People's Rapid Transit Co., (1890) 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728; Schaper v. Brooklyn, etc., R. Co., (1891) 124 N. Y. 630, 26 N. E. 311.

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Compensation to abutters.— Subdivision 4 does not authorize the occupation of a highway by a railroad without making compensation to an abutting owner who holds the fee therein. Williams v. New York Cent. R. Co., (1857) 16 N. Y. 97, 69 Am. Dec. 651.

Restoration of highways.— The provision as to the restoration of a highway or watercourse, formerly contained in this section, is now part of section 21.

V. Intersection of Other Railroads

In general.— The rule that property devoted to a public use cannot be taken for another use does not, by virtue of subdivision 5, prevent the acquisition of a right of intersection, etc. Jennings v. Delaware, etc., R. Co., (1905) 103 App. Div. 164, 93 N. Y. S. 374, affirmed (1907) 190 N. Y. 544 mem.

Connection of nonintersecting roads.— Even though two roads do not in fact intersect where they come so near together that it becomes desirable, for any reason, that one shall join or make connection with the other, authority exists under subdivision 5 for that purpose. Waverly v. Waverly, etc., Traction Co., (1909) 132 App. Div. 561, 116 N. Y. S. 1074; Jennings v. Delaware, etc., R. Co., (1905) 103 App. Div. 164, 93 N. Y. S. 374, affirmed (1907) 190 N. Y. 544 mem.; New York, etc., R. Co. v. Erie R. Co., (1898) 31 App. Div. 378, 52 N. Y. S. 318.

Connection of surface and elevated railway.— "A connection between a street surface railway and an elevated railroad, by an inclined plane" is not a joining or union within subdivision 5, and the plane cannot be constructed in a highway without the consent of abutting owners. Eldert v. Long Island Electric R. Co., (1898) 28 App. Div. 451, 51 N. Y. S. 186, affirmed (1901) 165 N. Y. 651, 59 N. E. 1122.

Intersection of street railway and steam railroad.— Under subdivision 5 a street railway has a right to intersect a steam railway. Oneonta, etc., R. Co. v. Cooperstown, etc., R. Co., (1903) 85 App. Div. 284, 83 N. Y. S. 307.

Intersections at grade.— Sections 91, 92 and 94 are separate and distinct in their application from subdivision 5 of this section. "Upon the subject of the 'point of crossing' where the laws relating to the crossings of railroads and grade crossings at public highways are both applicable, that relating to grade crossings is paramount." New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624.

Number of crossings.— The right to cross a railroad already constructed is not confined to one crossing, but there may be more than one if necessary and convenient. Matter of Boston, Hoosac Tunnel, etc., R. Co., (1879) 79 N. Y. 64.

Compensation for use of facilities.— Subdivision 5 does not grant the right to use the facilities of a connecting railroad without compensation, further provision being made on that question by section 22. Port Jervis, etc., R. Co. v. New York, etc., R. Co., (1892) 132 N. Y. 439, 30 N. E. 855.

Lands taken in intersection.— The right to cross or intersect another railroad does not authorize the invasion of lands or buildings already appropriated to railroad uses which in their nature require an exclusive occupation or which would be materially impaired by subjecting the land to the new use. Matter of Boston, Hoosac Tunnel, etc., R. Co., (1879) 79 N. Y. 64, Jennings v. Delaware, etc., R. Co., (1905) 103 App. Div. 164, 93 N. Y. S. 374, affirmed (1907) 190 N. Y. 544 mem.

Occupation of street.— Where, in order for two railways to intersect or unite, it becomes necessary to occupy a street the municipal authorities have the right to join in determining the manner of intersection. Waverly v. Waverly, etc., Traction Co., (1909) 132 App. Div. 561, 116 N. Y. S. 1074.

Procedure.— Subdivision 5 formerly provided for the procedure to be followed to determine the manner of intersection, etc. See Matter of Lockport, etc., R. Co., (1879) 77 N. Y. 557. Subdivision 5 is now supplemented by section 22, which provides a method for procuring the intersection. Jennings v. Delaware, etc., R. Co., (1905) 103 App. Div. 164, 93 N. Y. S. 374, affirmed (1907) 190 N. Y. 544 mem.

Cited.— Subdivision 5 was cited in Matter of Cortland, etc., R. Co., (1885) 98 N. Y. 336.

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VI. Stations and Motive Power

Duty to maintain stations.— While subdivision 6 grants power to a railroad to erect and maintain stations it creates no duty to do so which can be enforced by the courts, even though the same may be found to be necessary. People v. New York, etc., R. Co., (1887) 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

Change of motive power.— Subdivision 7 authorizes the use of electricity as a motive power in the place of steam. Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 760, 121 N. Y. S. 524.

VII. Time and Manner of Transportation

Tariff schedules and publication thereof: see Public Service Commissions Law, § 28.

Rates as fixed to be charged: See Public Service Commissions Law, § 33.

Changes in schedule and notice required: see Public Service Commissions Law, § 29.

Transportation prohibited until publication of schedules: see Public Service Commissions Law, § 33.

Power of public service commission to order changes in time schedules and the running of additional cars and trains: see Public Service Commissions Law, § 51.

Distribution of cars: see Public Service Commissions Law, § 37.

No railroad corporation to own or hold stock in navigation corporation: see Transportation Corporations Law, § 10.

Suspension of duties.— Subdivision 8 "cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight." People v. New York Cent., etc., R. Co., (1883) 28 Hun 543. Subdivision 8 vests railroad corporations "with discretion respecting the mode of exercising their franchises, and so long as their operations are not suspended and their duties are not unperformed, the courts should not interfere, especially on the application of a private individual, to regulate the exercise of their discretion; without refusal or neglect to perform the duties of carrier, the courts should not so interfere." People v. Long Island R. Co., (1883) 31 Hun 125.

Failure to operate part of day.—Authority to regulate the time and manner of transportation includes power to run trains over but part of its route at some hours of the day. People v. Brooklyn Heights R. Co., (1902) 69 App. Div. 549, 75 N. Y. S. 202, affirmed (1902) 172 N. Y. 90.

Compensation.—It seems that the grant of power to regulate the compensation to be paid for transportation does not abrogate the common law duty of a carrier to carry goods for a reasonable compensation. Killmer v. New York Cent., etc., R. Co., (1885) 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194.

Rules as to purchase of tickets.— It seems that a railroad may make rules requiring the purchase of a ticket as a condition to entrance in a train shed, and reasonable to restrict the time before the arrival of trains when entrance may be made thereto, as well as requiring trunks to be taken to the baggage room and checked. Avery v. New York Cent., etc., R. Co., (1890) 121 N. Y. 31, 24 N. E. 20.

Rules as to exhibition of tickets.— In an early case it was held that a rule permitting conductors to take up tickets where several stations were to be passed before reaching the passenger's destination, without giving any check to show that the fare had been paid, was not unreasonable. Vedder v. Fellows, (1859) 20 N. Y. 126.

In another case it was held that a rule requiring passengers to exhibit their tickets whenever called upon by the conductor to do so was reasonable. Hubbard v. New York, etc., R. Co., (1857) 15 N. Y. 455.

Rules as to transfers.— It seems that subdivision 8 authorizes a rule of a street railway limiting the right to use transfers to one continuous trip in the same general direction and denying the right to a transfer in a direction opposite to that which the traveler has once traversed. Kelly v. New York City R. Co., (1908) 192 N. Y. 97, 84 N. E. 569, affirming 119 App. Div. 223, 104 N. Y. S. 561.

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VIII. Creation of Mortgage

Power to borrow money and mortgage property: see Stock Corporation Law, § 6.

Validating corporate mortgages: see Stock Corporation Law, § 7.

Corporate mortgages not to be filed or refiled as chattel mortgages: see Lien Law, § 231.

After acquired property.— Under subdivision 10 a railroad may execute a mortgage on after acquired real or personal estate which will take precedence over a subsequent incumbrance. United States Mortgage, etc., Co. v. Eastern Iron Co., (1907) 120 App. Div. 679, 105 N. Y. S. 291, affirmed (1909) 195 N. Y. 589 mem.; Platt v. New York, etc., R. Co., (1896) 9 App. Div. 87, 41 N. Y. S. 42, affirmed on opinion below (1897) 153 N. Y. 670, 48 N. E. 1106.

Cited.— Subdivision 10 was cited in People v. Public Service Commission, (1913) 158 App. Div. 251, 143 N. Y. S. 148.

§ 9. Certificate of convenience and necessity. No railroad corporation formed after May eighteenth, eighteen hundred and ninety-two, under the laws of this state shall exercise the powers conferred by law upon such corporations or begin the construction of its road until the directors shall cause a copy of the certificate of incorporation to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks, and shall file satisfactory proof thereof with the public service commission; nor until the commission shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity require the construction of said railroad as proposed in said certificate of incorporation. The foregoing certificate shall be applied for within six months after the completion of the three weeks' publication hereinbefore provided for. If a certificate is refused no further proceedings shall be had before said commission, but the application may be renewed after one year from the date of such refusal. Prior to granting or refusing said certificate the commission shall have a right to permit errors, omissions or defects to be supplied and corrected. After a refusal to grant such certificate the commission shall certify a copy of all maps and papers on file in its office and of the findings of the commission when so requested by the directors aforesaid. Such directors may thereupon present the same to the appellate division of the supreme court of the department within which said road is proposed in whole or in part to be constructed, and said appellate division shall have power, in its discretion, to order said commission, for reasons stated, to issue said certificate, and it shall be issued accordingly. Such certificate shall be filed in the office of the secretary of state, and a copy thereof, certified to be a copy by the secretary of state, or his deputy, shall be evidence of the fact therein stated. Nothing in this section shall prevent any such railroad corporation from causing such examinations and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose by

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its officers or agents and servants, entering upon the lands or water of any person, but subject to the responsibility for all damages which shall be done thereto. The certificate provided for in this section shall not dispense with the permission and approval provided for in section fifty-three of the public service commissions law.

This section was derived from the Railroad Law of 1890, § 59, as added by L. 1892, ch. 676, and amended by L. 1895, ch. 545, § 1.

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I. In General

General jurisdiction of public service commissions: see Public Service Commissions Law, § 5.

Purpose of requirement.— The purpose of requiring a certificate was to prevent the organization of railroads "by those seeking by threats of destructive competition to levy tribute upon existing roads" and "also to prevent, or rather remove, the temptations to the officers of existing roads to build others that would be parasites upon existing roads by doing the business for their own profit that should be done by and for the profit of such existing road of which they are the officers." People v. Board of R. Com'rs, (1899) 4 App. Div. 559, 58 N. Y. S. 94, affirmed (1899) 160 N. Y. 202, 54 N. E. 667. The purpose is to prevent the paralleling of routes and procuring of franchises which should prevent others willing to do so from constructing roads covered by a previous unused franchise. Matter of Empire City Traction Co., (1896) 4 App. Div. 103, 38 N. Y. S. 983. "The requirement of this certificate is a mere preliminary. Its granting does not mean that the road will necessarily be built. In making its determination the function of the commission is exercised solely as guardian of the public weal (People ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1), and it was not intended to make such commission the body to determine the precise location of the road. The control of such precise location is vested elsewhere." Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627.

Body issuing certificate.— The power formerly exercised by the railroad commissioners is now conferred on the Public Service Commission by this section and section 53 of the Public Service Commissions Law. People v. Willcox, (1909) 196 N. Y. 212, 89 N. E. 459, affirming 133 App. Div. 556, 118 N. Y. S. 248.

Application to street railway.— This section applies generally to a street railway. Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., (1912) 78 Misc. 220, 139 N. Y. S. 216; Op. Atty.-Gen. (1898) 240. But it does not apply to a street railway formed prior to May 3, 1895, when L. 1895, ch. 545, took effect. Op. Atty.-Gen. (1898) 240.

Cited.— This section was cited in Jenkins v. Auburn City R. Co., (1898) 27 App. Div. 553, 50 N. Y. S. 852; Trojan R. Co. v. Troy, (1908) 125 App. Div. 362, 109 N. Y. S. 779, affirmed (1909) 195 N. Y. 614 mem.; People v. State Board of Tax Com'rs, (1914) 160 App. Div. 771, 146 N. Y. S. 112; Op. Atty. Gen. (1905) 214.

II. Necessity of Certificate

Extension of street railway.— Formerly where a line was in reality an extension of an existing street railway no certificate was necessary. Dela-

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ware, etc., R. Co. v. Syracuse, etc., R. Co., (1899) 28 Misc. 456, 59 N. Y. S. 1035, affirmed 43 App. Div. 621, 60 N. Y. S. 386; New York Cent., etc., R. Co. v. Auburn Interurban Electric R. Co., (1904) 178 N. Y. 75, 70 N. E. 117. The section applied, however, to a street railroad owning and operating a road four miles long which proposed to construct an "extension" seventy miles long, as such an "extension" was deemed in reality a new road and did not fall within section 10, which required a certificate in case of extensions only where they paralleled existing street railways. New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., (1904) 96 App. Div. 471, 89 N. Y. S. 418. It seems that now, however, the consent of the Public Service Commission to an extension of a street railway is required in all cases under section 53 of Public Service Commissions Law. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791.

Corporation curing defect after enactment.— Where a corporation defectively organized before the enactment of this section cured the defect under section 7 after the enactment of this section, it was necessary for it to procure a certificate under this section. Matter of New York, etc., R. Co., (1908) 193 N. Y. 72, 85 N. E. 1014, reversing 126 App. Div. 909, 110 N. Y. S. 1139.

Purchaser on foreclosure.— No certificate is necessary to enable a purchaser on foreclosure to take over and operate a railroad already constructed. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791.

Legislative exemption.—As the legislature might dispense with the procurement of a certificate as required by this section, it may validate municipal consents to construction and permit, by a general law, the construction of such railroads without compliance with this section. Kittinger v. Buffalo Traction Co., (1899) 160 N. Y. 377, 54 N. E. 1081; Matter of Buffalo Traction Co., (1898) 25 App. Div. 447, 49 N. Y. S. 1052, affirmed (1898) 155 N. Y. 700 mem.

Condition precedent to incorporation.— The powers which a corporation cannot exercise until a compliance is had with this section are those relating to the physical construction of a railroad. It is still a corporation with directors and officers. power to sue and be sued and to act as a corporate body, and even on refusal of a certificate is not functus officio, as it may again apply for a certificate after the expiration of one year. McWilliams v. Jewett, (1895) 14 Misc. 491, 36 N. Y. S. 620; Muehlenback v. Babylon North Shore R. Co., (1899) 26 Misc. 136, 55 N. Y. S. 1023.

Condition precedent to procuring franchise.—A compliance with this section is not a condition precedent to bidding for a franchise under section 173. Matter of Empire City Traction Co., (1896) 4 App. Div. 103, 38 N. Y. S. 983. And the procurance of a certificate under this section is not a condition precedent to procuring the consent of local authorities to the construction of a road. People v. Bauer, (1907) 54 Misc. 28, 103 N. Y. S. 1081.

III. Procedure to Obtain Certificate

Notice of application.— This section does not provide for the taking of any property, hence no notice of the application is necessary unless required by the commission. Frontier, etc., R. Co. v. Public Service Commission (1913) 155 App. Div. 57, 139 N. Y. S. 627.

Publication of articles.— The section does not seem to require that the articles of association be published before application is made for a certificate of convenience, and it is sufficient if publication is completed before a hearing is had or certificate issued. People v. Board of R. Com'rs, (1905) 101 App. Div. 251, 91 N. Y. S. 977, affirmed (1906) 184 N. Y. 563, 76 N. E. 1103.

IV. Defects in Incorporation

Payment of capital.— The Public Service Commission in acting under this section "proceeds judicially and is required to determine, at the outset, whether the corporation is one de jure, by reason of a compliance with what the statute commands as essential to due incorporation. If the ten per cent of the minimum amount of capital stock has not been subscribed, nor paid in good faith and in cash, there has been no legal incorporation and that question the board must determine." People v. Public Service Commission,

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(1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. Y. S. 968. To like effect see People v. Public Service Commission, (1908) 127 App. Div. 480, 112 N. Y. S. 133, modified (1909) 194 N. Y. 543, 87 N. E. 1125; Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004; People v. Public Service Commission, (1907) 122 App. Div. 283, 106 N. Y. S. 968, affirmed (1909) 195 N. Y. 157. It is the road described in the articles of incorporation, and not in maps filed with the commission, to which the certificate relates, and the question of the sufficiency of the cash capital under section 5 to be determined with reference thereto. People v. Board of R. Com'rs, (1904) 99 App. Div. 85, 91 N. Y. S. 375.

Defective acknowledgment.— Where a certificate of incorporation is claimed to be defectively acknowledged the commission may investigate and if it finds it to be true should refuse a certificate. People v. Board of R. Com'rs, (1905) 105 App. Div. 273, 93 N. Y. S. 584.

Supplying defects.— Under the provision authorizing the commission before granting a certificate to permit defects to be supplied and corrected, the commission may permit such changes in the route of a street railway as are made necessary by the refusal of local authorities to permit certain streets to be occupied, where the general route is substantially the same. People v. Board of R. Com'rs, (1899) 42 App. Div. 366, 59 N. Y. S. 144, appeal dismissed (1899) 160 N. Y. 690, 55 N. E. 1099.

Certificate as evidence of regularity.— The issuance of a certificate is itself proof of the regularity of the incorporation. Erie, etc., R. Co. v. Brown, (1907) 57 Misc. 164, 107 N. Y. S. 693, affirmed (1908) 123 App. Div. 655.

V. Determination of Convenience and Necessity

General considerations.— If the convenience and necessities of the public in the locality to be served require the road a certificate should be issued unless some other public interests would be prejudiced thereby. Matter of Long Lake R. Co., (1896) 11 App. Div. 233, 42 N. Y. S. 125. Under this section the railroad commissioners have to pass upon the specific application of each company; they are to determine whether "public convenience and necessity require the construction of said railroad, as proposed in said articles of association" of the petitioning company; that is something more than determining whether public necessity and convenience require the construction of a railroad between the points mentioned in the articles of association as the proposed termini of their road. It means something more than merely determining whether public convenience and necessity require the building of any road between the proposed termini; they must determine whether public convenience and necessity require the construction of the specific road proposed in the articles of association of the petitioning corporation. People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861.

Protest by public.— While the protest of an individual should not prevent the building of a railroad called for by public necessity and which will serve the public convenience, yet where a large majority of the owners of lands whose convenience it is claimed demands a road protest against the issuance of a certificate, and public convenience does not otherwise demand it, a certificate should be refused. People v. Board of R. Com'rs, (1905) 103 App. Div. 123, 93 N. Y. S. 58, affirmed (1906) 184 N. Y. 575, 77 N. E. 1191, followed in denying an application for a similar certificate in People v. Board of R. Com'rs, (1908) 128 App. Div. 814, 114 N. Y. S. 122; People v. State Board of R. Com'rs, (1904) 95 App. Div. 38, 88 N. Y. S. 522.

Doubt as to financial success.— "There is no public necessity for the construction of a road which cannot maintain itself and which must inevitably be bankrupt from the beginning; such a road . . . cannot be a public convenience or necessity." People v. Board of R. Com'rs, (1908) 124 App. Div. 47, 108 N. Y. S. 288, affirmed (1908) 192 N. Y. 573, 85 N. E. 1114. Where, however, it appears that a proposed road is desirable and necessary a certificate should not be refused because a doubt exists as to whether the road would pay. Matter of Ticonderoga Union Terminal R. Co., (1906) 116 App. Div. 56, 101 N. Y. S. 107.

Location in proposed Forest Preserve.— The fact that the road is proposed to be located on lands in the Adirondacks which the state may desire to

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acquire for the Forest Preserve, and that its construction would enhance values and require the state in the end to pay more for lands, is no objection to granting a certificate. Matter of Long Lake R. Co., (1896) 11 App. Div. 233, 42 N. Y. S. 125.

Previous denial of application.— The fact that on a prior application by another company the commission has refused a certificate permitting the use of a certain village street is not a legal estoppel on the application of another company. People v. Aldridge, (1908) 126 App. Div. 484, 110 N. Y. S. 820, affirmed (1909) 195 N. Y. 574, 89 N. E. 1109.

Connection of branches.— No certificate is authorized for a short railroad which will operate only to take freight from a railroad at one point and deliver it to the same road at another point, avoiding grades and crossings, the officers of both companies being the same, as such a road is a mere switch or additional tracks for an existing road. People v. Board of R. Com'rs, (1899) 40 App. Div. 559, 58 N. Y. S. 94, affirmed (1899) 160 N. Y. 202, 54 N. E. 697.

Existence of another franchise.— The fact that a road which has been in existence for many years has at last decided to build the road which it was authorized to build does not preclude the issuance to another company of a certificate for practically the same route. People v. Board of R. Com'rs, (1903) 81 App. Div. 237, 81 N. Y. S. 26, affirmed (1903) 176 N. Y. 577, 68 N. E. 1123. Accordingly a railroad which has held a certificate of convenience for three years and has done but little work on its proposed road has but little standing to oppose the granting of a certificate to a parallel line. People v. Aldridge, (1908) 126 App. Div. 484, 110 N. Y. S. 820, affirmed (1909) 195 N. Y. 574, 89 N. E. 1109. Again, the fact that there exists a franchise for constructing another railroad on the proposed line is not a good reason for refusing a certificate where construction has not been commenced and the conditions of the franchise are so onerous as to render its construction unlikely. Matter of Wood, (1904) 99 App. Div. 334, 91 N. Y. S. 225, affirmed (1905) 181 N. Y. 93.

Priority of organization.— Priority of organization gives no priority of right to a certificate. People v. Board of R. Com'rs, (1903) 81 App. Div. 237, 81 N. Y. S. 26, affirmed (1903) 176 N. Y. 577, 68 N. E. 1123; People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861.

Conditions of local franchise.— Where the Public Service Commission determines that public convenience will be served by the construction of a railway it cannot refuse a certificate because there is no provision in its franchise by which the applicant can be made to construct extensions which may in the future become necessary by reason of the development of the section. People v. Willcox, (1909) 196 N. Y. 212, 89 N. E. 459, affirming 133 App. Div. 556, 118 N. Y. S. 248.

Injury to existing railroads.— Where a proposed road for all practical purposes parallels an existing road and would have a tendency to destroy and impair vested property rights without any material benefit resulting therefrom a certificate is properly denied. Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004. "The certificate of public convenience and necessity is to be granted upon considerations not alone bearing upon the convenience of the public but affecting the other transportation companies, which are already serving the territory. They have the right to be considered and to be protected where there is no necessity for a wider public service against the designs of persons more interested in forcing terms from them than in subserving the public convenience. Certainly the rights of shareholders in the existing roads demand fair consideration." People v. Public Service Commission, (1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. Y. S. 968. However, the fact that a proposed electric interurban line will parallel existing lines of steam railroads is not conclusive against granting a certificate if local traffic demands will be better served thereby. Matter of Rochester, etc., Traction Co., (1907) 118 App. Div. 521, 102 N. Y. S. 1112, appeal dismissed (1907) 189 N. Y. 522, 81 N. E. 1174. Also the fact that a proposed branch of a trunk line will parallel for part of its distance a street railway is only one fact to be considered on an application for a certificate. People v. Aldridge, (1908) 126 App. Div. 484, 110 N. Y. S. 820, affirmed (1909) 195 N. Y. 574, 89 N. E. 1109.

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VI. Proposed Route

In general.— "The general plan of this legislation would seem conclusive that a fixed and definite route is not required to be adopted at the time of the application for the certificate and that the question of the route is material at that stage of the proceeding only in so far as investigation of a route or routes becomes essential to the intelligent determination of the public necessity and convenience." Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627.

Route described in articles.— "It is the description of the proposed line, as embodied in the certificate of incorporation, which forms the sole limitation as to the investigation of the commission, and such general identification is not required to . . . provide further than a location of the two ends of the line." People v. Public Service Commission, (1916) 171 App. Div. 366, 156 N. Y. S. 1023. "Upon application for a certificate of public convenience and necessity by a steam railroad corporation the question of such convenience and necessity is to be determined with reference to the railroad as identified in the articles of incorporation of such company, and . . . upon such determination the commission has the right to consider any route or routes which do not vary the location of the road as identified in the articles of incorporation." Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627. Where the petition is for a certificate for a proposed road having a different terminus than that specified in the articles of association, it must be refused. Matter of Ticonderoga Union Terminal R. Co., (1906) 116 App. Div. 56, 101 N. Y. S. 107.

Maps.— The provision of this section as to certifying maps is not a requirement that the precise route shall be shown by maps which must be filed, and no maps are necessary unless required by the commission to enable it to determine the question of necessity and convenience. Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627. However, it has been held that it is important that the Public Service Commission should have before it the specific route proposed and shall approve or disapprove of that route, as the determination is conclusive on landowners as to the necessity and convenience, who should have notice of the proceedings through the publication of the articles of association. People v. Board of R. Com'rs, (1904) 92 App. Div. 126, 87 N. Y. S. 334.

VII. The Certificate

Conditions.— It has been held that the commission has no power to grant a certificate to an interurban railway on condition that its route shall be varied, in its discretion, so as to be on private property, except through cities, villages and hamlets. People v. Board of R. Com'rs, (1904) 92 App. Div. 126, 87 N. Y. S. 334.

Variation in termini.— Where the proposed terminus of a proposed route, as stated in the certificate of incorporation, is the line of another projected railroad, which is stated to be about a certain distance from another railroad in operation, a certificate of convenience which gives the terminus as the line of the projected railroad but gives a different approximate distance from the railroad in operation is not objectionable as changing the terminus. People v. Public Service Commission, (1916) 171 App. Div. 366, 156 N. Y. S. 1023.

Delivery.— Where a certificate has been issued but the delivery delayed until payment of the organization tax in pursuance of the provisions of the Tax Law, the certificate does not become effective until delivered. People v. Public Service Commission, (1909) 195 N. Y. 157, 88 N. E. 261, affirming 122 App. Div. 283, 106 N. S. Y. 968.

VIII. Review of Proceedings

Power.— The power of the Appellate Division to review the determination of the commission was sustained in the Matter of Buffalo Frontier Terminal R. Co., (1909) 131 App. Div. 503, 115 N. Y. S. 483.

Proper remedy.— Where a certificate has been refused and the papers properly certified the matter may properly be brought before the Appellate

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Division by an order to show cause why a certificate should not be issued. Matter of Rochester, etc., Traction Co., (1907) 118 App. Div. 521, 102 N. Y. S. 1112, appeal dismissed (1907) 189 N. Y. 522, 81 N. E. 1174. The refusal to grant a certificate cannot be reviewed on certiorari, as it is not a final determination but is subject to review by the Appellate Division. People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861. The action of the commission in granting a certificate may, however, be reviewed on certiorari on application of a rival company whose application for a certificate was denied. People v. Board of R. Com'rs, (1908) 128 App. Div. 814, 114 N. Y. S. 122. The granting of a certificate also might be reviewed on certiorari by one owning lands affected by the determination, no other method of review being provided in such a case. People v. Board of R. Com'rs, (1899) 160 N. Y. 202, 54 N. E. 697, affirming 40 App. Div. 559, 58 N. Y. S. 94; People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861.

Practice.— "It must be conceded that the statute is exceedingly meagre in its provisions as to the practice to be followed, and doubtless for that reason most of the proceedings for the review of actions of the Board of Railroad Commissioners have been by certiorari. But we think the legislative intent is sufficiently apparent from the provisions to which we have referred. It was intended to vest in the general term (now Appellate Division) power to review the determination of the railroad commissioners in case they should refuse the certificate of public convenience and necessity. (Matter of New Hamburgh & P. C. R. R. Co., 76 Hun 76.) For this purpose the railroad commissioners were required, on the request of the directors of a railroad company, to certify a copy 'of all maps and papers on file' in their office and of the findings of the board. It is true that the statute does not in express terms state that the commissioners shall certify a copy of the testimony taken before them, but we think that the certification of the testimony was implied and intended. The testimony, with the maps and papers on file, together with the findings of the board, furnishes a complete record of all the proceedings before the commissioners and enables the Appellate Division to review the determination made thereon. It is also true that the statute has not pointed out the practice that should be adopted in bringing the case to a hearing before the Appellate Division, but that court may by rule or otherwise specify the time and notice that shall be given to the parties interested upon which it will entertain the application." Matter of Wood, (1905) 181 N. Y. 93, 73 N. E. 561, affirming 99 App. Div. 334, 91 N. Y. S. 225.

Record on review.— The financial standing of the promoters and the bona fides of the enterprise are not legally matters for the consideration of the commission and on certiorari it will not be required to return as to statements on that head taken in executive session, though required under a standing rule. People v. Board of R. Com'rs, (1902) 39 Misc. 1, 78 N. Y. S. 750, affirmed (1902) 76 App. Div. 302.

Time of review.— Where a certificate of necessity is signed, but its delivery delayed until compliance with the provisions of the Tax Law as to the payment of the franchise tax, the certificate, for purposes of review, does not become final until delivered. People v. Public Service Commission, (1907) 122 App. Div. 283, 106 N. Y. S. 968, affirmed (1909) 195 N. Y. 157.

Scope of review, generally.— In a proceeding in the Appellate Division the matter will be treated as an original application to be heard on the evidence and records before the commission and such additional evidence as the parties may produce. Matter of Rochester, etc., Traction Co., (1907) 118 App. Div. 521, 102 N. Y. S. 1112, appeal dismissed (1907) 189 N. Y. 522, 81 N. E. 1174.

While it may be proper for the Public Service Commission to require proof of the bona fides of the enterprise and the financial ability of the promoters, those questions are entirely foreign to the questions of convenience and necessity and will not be considered on a review by the Appellate Division. People v. Board of R. Com'rs, (1902) 76 App. Div. 302, 78 N. Y. S. 750, 79 N. Y. S. 1143.

Error in ruling on evidence.— "Ordinarily the board of railroad commissioners is not subject to the same rules as to the admission of evidence as apply in a court of justice and their proceedings should not be vacated for an erroneous ruling in rejecting or receiving evidence except where such evidence might be controlling. But where material and convincing evidence is

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offered tending to show that the ten per cent has not been paid actually and in good faith in cash the exclusion of such evidence is error and calls for a reversal of their determination." People v. Public Service Commission, (1908) 127 App. Div. 480, 112 N. Y. S. 133, modified (1909) 194 N. Y. 543, 87 N. E. 1125.

Burden of showing error.— Great weight will be given the decision of the commission on a review in the Appellate Division. Matter of Rochester, etc., Traction Co., (1907) 118 App. Div. 521, 102 N. Y. S. 1112, appeal dismissed (1907) 189 N. Y. 522, 81 N. E. 1174; People v. Board of R. Com'rs, (1903) 81 App. Div 242, 81 N. Y. S. 20, affirmed (1903) 175 N. Y. 516, 67 N. E. 1088. On a review in the Appellate Division the burden is on the petitioner to show error in the determination of the commission. Matter of Kings, etc., R. Co., (1896) 6 App. Div. 241, 39 N. Y. S. 1004; People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861. It has been held that on a review by the Appellate Division "the same rule, as to the preponderance of proof, is to be applied as upon an application to set aside a verdict in an action in the Supreme Court." People v. Board of R. Com'rs, (1899) 42 App. Div. 366, 59 N. Y. S. 144, appeal dismissed (1899) 160 N. Y. 690, 55 N. E. 1099; People v. Board of R. Com'rs, (1900) 54 App. Div. 615, 66 N. Y. S. 198.

Granting certificate pending review.— Where the Public Service Commission has refused a certificate and the Appellate Division has ordered a certificate to issue, from which order an appeal has been taken to the Court of Appeals and an undertaking given, it is error for the Public Service Commission, pending the appeal, to grant a certificate. Erie R. Co. v. Rochester, etc, Traction Co., (1907) 57 Misc. 180, 107 N. Y. S. 940.

Ordering rehearing before commission.— Where two rival companies have applied for a certificate for practically the same route and a certificate has been granted to one, but it is claimed that conditions have changed since the hearing, the Appellate Division may order a rehearing before the commission. Matter of Buffalo Frontier Terminal R. Co., (1909) 131 App. Div. 503, 115 N. Y. S. 483. A rehearing before the Public Service Commission was ordered in People v. Public Service Commission, (1909) 194 N. Y. 543, 87 N. E. 1125, modifying 127 App. Div. 480, 112 N. Y. S. 133.

Jurisdiction of Court of Appeals.—An order made by the Appellate Division in proceedings by certiorari under this section is a final order in a special proceeding and is reviewable in the Court of Appeals as a matter of right under section 190 of the Code of Civil Procedure so far as questions of law are concerned. Matter of Wood, (1905) 181 N. Y. 93, 73 N. E. 561, affirming 99 App. Div. 334, 91 N. Y. S. 225.

§ 10. Public service commissions may certify part of the route of a street surface railroad; power to revoke certificates; street surface railroad extensions. Whenever application is made by a street surface railroad company for a certificate of public convenience and a necessity as required by the provisions of section nine, and it shall appear to the public service commission, after examination of the proposed route of the applicant company that public convenience and a necessity do not require the construction of said railroad as proposed in its certificate of incorporation but do require the construction of a part of the said railroad, the commission may issue its certificate for the construction of such part of the said railroad as seems to it to be required by public convenience and a necessity. In case any railroad company which shall hereafter obtain the certificate of the commission that public convenience and a necessity require the construction of the whole or a part of the said railroad shall fail to begin such construction within two

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years from the date of the issuing of said certificate, the commission may inquire into the reason for such failure and the said commission may revoke said certificate if it shall appear to it to be in the public interest so to do. Any street surface railroad company which proposes to extend its road beyond the limits of any city or incorporated village by a route which will be practically parallel with a street surface railroad already constructed and in operation shall first obtain the certificate of the commission that public convenience and a necessity require the construction of such extension as provided in the case of a railroad corporation newly formed. Before making application for such certificate the corporation shall cause to be advertised the route of the proposed extension in one or more newspapers in each county in which such extension is to be constructed, at least once a week for three successive weeks, and shall file satisfactory proof of such publication with the commission. Nothing in this section shall prevent street railroad companies from making extensions within the limits of cities or incorporated villages upon compliance with the provisions of law now applicable thereto.

This section was derived from the Railroad Law of 1890, § 50-a, as added by L. 1898, ch. 643, § 1, and amended by L. 1902, ch. 226, § 1.

Change of route.— When the commission may approve part of the route it cannot change the route specified in the articles of association and the application for a certificate. People v. Board of R. Com'rs, (1904) 92 App. Div. 126, 87 N. Y. 334.

Extension.— By reason of this section a street railway was formerly not required to procure a certificate under section 9 for an extension of its lines except in cases specified in this section. New York Cent., etc., R. Co. v. Auburn Interurban Electric R. Co., (1904) 178 N. Y. 75, 70 N. E. 117, affirming 79 App. Div. 645, 80 N. Y. S. 1141; Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791; New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., (1904) 96 App. Div. 89 N. Y. S. 418. But where the "extension" was in fact a new railway a certificate under section 9 must be obtained. New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., (1904) 96 App. Div. 471, 89 N. Y. S. 418. A certificate is now required in all cases by the Public Service Commissions Law, it seems.

Cited.— This section was cited in Matter of Buffalo Frontier Terminal R. Co., (1909) 131 App. Div. 503, 115 N. Y. S. 483 (see § 9); Matter of Wood, (1904) 99 App. Div. 334, 91 N. Y. S. 225 (per Hatch, J., dissenting; see § 9), affirmed (1905) 181 N. Y. 93.

§ 11. Revocation of certificate under certain circumstances. Whenever it shall be made to appear to the public service commission that any steam railroad corporation, which has obtained from it or from the board of railroad commissioners a certificate under section nine of this chapter since eighteen hundred and ninety-four, and whose road is less than ten miles in length, and was to be built in the counties of Saratoga and Washington, shall not have completed its construction and put it in operation within three years after obtaining such certificate, the said commission, on notice to such corporation, shall have the power

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to revoke the said certificate and consent and thereupon the corporate existence and power of such railroad corporation shall cease and determine.

This section was derived from the Railroad Law of 1890, 59-b, as added by L. 1899, ch. 597, § 1.

§ 12. **When corporate powers to cease.** If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing such certificate, its corporate existence and powers shall cease; [1] provided, however, in case a railroad corporation has been heretofore incorporated to construct a railroad neither wholly nor in part within a city of the first class having more than one million inhabitants according to the last federal census, and the public service commission upon an application therefor presented and filed with said commission prior to January first, nineteen hundred and fourteen, shall have certified that public convenience and a necessity require the construction of such railroad as proposed in its certificate of incorporation as provided in this article, or shall have given its permission and approval to begin construction of such railroad pursuant to the provisions of the public service commissions law, then and in that case the corporate existence and powers of such a railroad corporation shall cease if said corporation shall not begin construction of its said road and expend thereon ten per centum of its capital within five years from the time when the public service commission shall have granted such certificate or given such permission and approval, or shall not finish its road and put it in operation in ten years from the time when the public service commission shall have granted such certificate or given such permission and approval; and provided also, that the time during which such a railroad corporation may be stayed by an injunction, from beginning or completing such construction, or during which a legal proceeding is pending to review the determination of the public service commission, or while an appeal is pending in any such proceeding, shall not be a part of the time so limited for beginning or completing the construction of any such railroad, and this provision shall apply to any such railroad corporation to which such certificate or permission and approval have heretofore been granted by the proper public service commission if an application therefor shall have been made and filed with said commission prior to January first, nineteen hundred and fourteen. But if any such steam railroad corporation whose certificate of incorpora-

[1] Remainder of sentence added.

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tion was filed since the year eighteen hundred and eighty, and whose road as designated in such certificate is wholly within one county and not more than ten miles in length, has acquired the real property necessary for its roadbed by purchase, its corporate existence and powers shall not be deemed to have ceased because of its failure to comply with the provisions of this article; and the time for beginning the construction of its road and expending thereon ten per centum of its capital, is extended until thirteen years from the date of the filing of such certificate and the time for finishing its road and putting it in operation, is extended until eighteen years from the date of such filing. [1]Where any railroad corporation organized for the purpose of constructing and operating a tunnel railway upon or under any of the streets of a city having a population of more than one million inhabitants, within the time allowed by law after filing its certificate of incorporation, shall have obtained the consent of the municipal authorities and abutting property owners to the construction of such railway and shall have constructed a portion thereof, the said railway and all surviving franchises, consents, permits and property connected therewith shall vest in the directors of the said corporation, their survivors or successors; and if the public service commission of the district in which said railway is located shall find that public convenience and advantage will be best subserved by the completion and operation thereof, it shall be lawful for said directors, their successors or assigns, with the permission of the commission and the mayor of such city, to assign such railway and all surviving franchises, consents, permits and property to any railroad corporation created under the laws of the state, which shall hereafter receive a franchise or contract for the construction and operation of a railroad upon the whole or any portion of the route of said tunnel railway which has been so constructed as aforesaid, and when so assigned the said tunnel railway shall, to the extent that it shall be then completed, be deemed within the terms of said last named franchise or contract to have been constructed under and pursuant thereto. This section shall not apply to any street surface railroad company incorporated prior to July first, eighteen hundred and ninety-five, which has obtained or become the owner of the consents of the local authorities of any city of the first or second class, given under article five of the railroad law to the use of public streets, avenues or highways for the construction and operation of the railroad thereon.

This section was derived from the Railroad Law of 1890, § 5, as amended by L. 1893, ch. 433; L. 1901, ch. 508, § 1. It was amended by L. 1914, ch. 492, in the manner indicated in the footnotes. This amendment included provisions contained in L. 1910, ch. 478.

[1] Following sentence added.

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Self-executing.— The provision that "its corporate existence and powers shall cease" is self-executing and no judicial dissolution is required. In re Brooklyn El. R. Co., (1891) 125 N. Y. 434, 26 N. E. 474; Matter of Brooklyn, etc., R. Co., (1878) 75 N. Y. 335; Matter of Brooklyn, etc., R. Co., (1878) 72 N. Y. 245; People v. Steers, (1913) 158 App. Div. 153, 143 N. Y. S. 52, affirmed (1914) 211 N. Y. 538 mem.; Op. Atty.-Gen. (1891) 254.

Corporations chartered by special acts.— This section does not apply to a corporation chartered under a special act providing as to the effect of failure to put its road in operation in a specified time, though such special act incorporates in it such provisions of the Railroad Law as are not inconsistent with it. In re Brooklyn El. R. Co., (1891) 125 N. Y. 434, 26 N. E. 474.

Street railways.— This section is applicable to street surface railroad companies. People v. Steers, (1913) 158 App. Div. 153, 143 N. Y. S. 52, affirmed (1914) 211 N. Y. 538 mem.; Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664; Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N. Y. S. 113. It was not repealed as to such railways by section 179, infra. Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N. Y. S. 113.

Extension of street railway.— This section applies to an extension of a street railway and the time of completion dates from the time of filing the certificate of extension. Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N. Y. S. 113.

Application to several routes.— Where a street railway obtains at the same time a consent to construct several different lines within a city, the routes as a whole do not constitute one extension but each route is a separate extension and the required work must be done on it or the franchise is lost. People v. Steers, (1913) 158 App. Div. 153, 143 N. Y. S. 52, affirmed (1914) 211 N. Y. 538 mem.

Construction by another corporation.— It is not a fulfillment of this section for a street railway company having a franchise covering certain streets to lease its right to occupy certain streets to another company, reserving to itself the right to use some of the tracks for a rental, and construction by such other company cannot be credited to it. Matter of Brooklyn, etc., R. Co., (1880) 81 N. Y. 69.

Effect on franchises.— The failure to complete a railroad and put it in operation within the prescribed time not only destroys the corporate franchise but also destroys franchises granted by municipalities permitting the occupation of streets. New York v. Bryan, (1909) 196 N. Y. 158, 89 N. E. 467, reversing 130 App. Div. 658, 115 N. Y. S. 551. But see L. 1910, ch. 478, which seems to alter this rule as to certain railroads.

Cited.— This section was cited in Troy, etc., R. Co. v. Boston, etc., R. Co., (1881) 86 N. Y. 107; People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858, affirming 67 Misc. 508, 124 N. Y. S. 711; People v. State Board of Tax Com'rs, (1910) 67 Misc. 474, 123 N. Y. S. 609.

§ 13. Corporations failing to finish road. Any railroad corporation that was duly incorporated after the year eighteen hundred and eighty-five, under the provisions of chapter one hundred and forty of the laws of eighteen hundred and fifty, and the acts amendatory thereof, and that within two years after its certificate of incorporation was filed, began the construction of its road and expended five hundred thousand dollars thereon, but failed to finish its road and put it in operation within ten years from the time of filing such certificate, shall be entitled to and have all the rights and be subject to all the obligations intended or provided by the next section of this chapter.

This section was derived from L. 1898, ch. 263, § 1.

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§ 14. **Time extended.** Any such corporation may finish its road and put it in operation; and the rights, powers, privileges, franchises, obligations, duties, restrictions and limitations of any such corporation shall be as though the time heretofore provided by law to finish its road and put it in operation, had been fifteen years from the date of filing its certificate of incorporation; and all rights or franchises acquired by any such corporation to construct its road in, upon, along or across any street or highway, and all proceedings to locate or extend its route or change its termini, or acquire any franchise, and all liens or obligations against any such corporation are hereby expressly conferred, imposed and continued to the same effect as though the time for finishing its road had been fifteen years as aforesaid. This section and the preceding one shall not apply to any street railroad, whether surface, elevated or depressed, nor to any railroad more than twenty miles in length.

This section was derived from L. 1898, ch. 263, § 2.

§ 15. **Time extended where there has been a receiver.** In every case where a receiver of the property or franchise of a domestic railroad corporation was appointed prior to the fifteenth day of May, nineteen hundred and three, by a court of this state or by a court of the United States having jurisdiction within the limits of this state, the time intervening between the entry of the order, judgment or decree appointing a receiver in the first instance and the entry of the order, judgment or decree finally terminating the receivership, shall not be or be taken to be part of the time limited by law for beginning the construction of its road by such railroad corporation, or for the expenditure by it of ten per centum on the amount of its capital stock on such construction, or for finishing its road or putting it in operation, and the expiration heretofore or hereafter during such receivership of the time so limited shall not be taken to have terminated or in any way to have affected the existence, franchises, rights or privileges of said corporation; but such corporation shall have all rights, privileges, powers and franchises to which if a valid corporation it would have been entitled by law at the time of filing its certificate of incorporation, together with such rights, privileges, powers and franchises as have since been or may hereafter be granted by law to such corporation; provided that nothing in this section contained shall in any way alter, affect or impair any vested right or interest. And such corporation, or in case of a sale of its franchises by the court, then the successor corporation acquiring the franchise, shall be entitled to the same period of time for the performance of said acts and things after the termination of receivership, as remained to said corporation at the time of entry of the order,

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judgment or decree appointing a receiver in the first instance. This section shall not apply to or affect any street surface railroad company the route of which in whole or in part lies within any city of the first or second class in this state, and shall not apply to or affect any railroad corporation incorporated under any private or local act.

This section was derived from L. 1903, ch. 626, § 1.

Power of legislation.— In op. Atty.-Gen. (1905) 214, it was held that L. 1903, ch. 626, extending grace to railroad corporations during the times they were under receiverships, was valid.

§ 16. Location of route. Every railroad corporation, except a street surface railroad corporation and an elevated railroad corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file them in the office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupants. Any such occupant or the owner of the land aggrieved by the proposed location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the supreme court, in the judicial district where the lands are situated, by petition duly verified, for the appointment of commissioners to examine the route.

The petition shall state the objections to the route designated, shall designate the route to which it is proposed to alter the same, and shall be accompanied with a survey, map and profile of the route designated by the corporation, and of the proposed alteration thereof, and copies thereof shall be served upon the corporation and such owners or occupants with the notice of the application. The justice may, upon the hearing of the application, appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route proposed by the corporation, and the route to which it is proposed to alter the same, and after hearing the parties, to affirm the route originally designated, or adopt the proposed alteration thereof, as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alterations; but no alteration of the route shall be made except by the concurrence of the commissioner who is a

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practical civil engineer, nor which will cause greater damage or injury to lands or materially greater length of road than the route designated by the corporation, nor which shall substantially change the general line adopted by the corporation.

The commissioners shall, within thirty days after their appointment, make and certify their written determination, which with the petition, map, survey and profile, and any testimony taken before them shall be immediately filed in the office of the county clerk of the county. Within twenty days after such filing, any party may, by written notice to the other, appeal to the appellate division of the supreme court from the decision of the commissioners, which appeal shall be heard and decided at the next term held in the department in which the lands of the petitioners or any of them are situated, for which the same can be noticed, according to the rules and practice of the court. On the hearing of such appeal, the court may affirm the route proposed by the corporation or may adopt that proposed by the petitioner.

The commissioners shall each be entitled to six dollars per day for their services, and to their reasonable and necessary expenses, to be paid by the persons who applied for their appointment. If the route of the road, as designated by the corporation, is altered by the commissioners, or by the order of the court, the corporation shall refund to the petitioner the amount so paid, unless the decision of the commissioners is reversed upon appeal taken by the corporation. No such corporation shall institute any proceedings for the condemnation of real property in any county until after the expiration of fifteen days from the service by it of the notice required by this section. Every such corporation shall transmit to the public service commission the following maps, profiles and drawings exhibiting the characteristics of its road, to wit:

A map or maps showing the length and direction of each straight line; the length and radius of each curve; the point of crossing of each town and county line, and the length of the line in each town and county accurately determined by measurements to be taken after the completion of the road.

Whenever any part of the road is completed and used, such maps and profiles of such completed part shall be filed with the commission within three months after the completion of any such portion and the commencement of its operation; and when any additional portion of the road shall be completed and used, other maps shall be filed within the same period of time, showing the additional parts so completed. If the route, as located upon the map and profile filed in the office of any county clerk, shall have been changed, it shall also cause a copy of the map and profile filed in the office of the public service commission, so far as it may

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relate to the location in such county, to be filed in the office of the county clerk.

This section was derived from the Railroad Law of 1890, § 6, as amended by L. 1892, ch. 676.

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I. In General

Power of superintendent of public works over railroads near canals: see Canal Law, § 35.

When railroads authorized through state hospital lands: see Insanity Law, § 66.

Street railway.— This section is made applicable to street railways by section 170. Stillwater, etc., R. Co. v. Slade, (1899) 36 App. Div. 587, 55 N. Y. S. 966.

Railroad organized under Rapid Transit Act.— It seems that this section does not apply to a railroad constructing a line under the Rapid Transit Act. (See article 6.) Hudson, etc., R. Co. v. Wendel, (1908) 193 N. Y. 166, 85 N. E. 1020.

Corporation acquiring railroad.— It seems that a corporation organized to take over a railroad already in operation need file no new map. People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75.

Acquisition of lands for extensions.— Where it becomes necessary for a railroad under construction to acquire lands adjacent to its right of way in making a cut, no change of route being contemplated, no new map need be filed but the lands may be acquired under section 17. Matter of South Brooklyn, R., etc., Term. Co., 1888) 50 Hun 405, 801, 2 N. Y. S. 613. The filing of a map under this section is not required where a railroad in operation intends to construct an additional main line track to serve increased traffic demands. New York Cent., etc., R. Co. v. Untermyer, (1909) 133 App. Div. 146, 117 N. Y. S. 443, affirmed (1909) 196 N. Y. 531, 89 N. E. 1106. In other words the section does not apply to the taking of additional lands by an existing railroad unless such taking contemplates a change or an extension of an existing route, and accordingly does not apply to a taking under section 17. New York Cent., etc., R. Co. v. Ernst, (1906) 114 App. Div. 874, 100 N. Y. S. 175.

Cited.— This section was cited in Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169 (per Vann, J., dissenting); Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791; People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting); People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861 (per Parker, J., dissenting).

II. Filing Map

Object of map.— "The main if not the only object of this map evidently is to notify all persons whose lands are to be taken of the intended location of the road." Mason v. Brooklyn City, etc., R. Co., (1861) 35 Barb. 373.

Sufficiency.— The map should be so plain that an ordinary person may understand it and should be exact enough so that based on it an order of condemnation could be made which would convey the title to real property. Matter of New York, etc., R. Co., (1871) 62 Barb. 85, 12 Abb. Pr. N. S. 21. "The map required to be filed is intended mainly for the purpose of acquiring property necessary to be taken, and is sufficient if it shows the alignment and profile without showing all the connections, turnouts and switches." People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75. A map which gives but one line showing the route and which is not designated as a center line, shows no neighboring highways, streams or landmarks, which is not attached

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to a profile, and from which no one could tell whether his lands were affected, though possible of being located by a surveyor, is deficient. Matter of New York, etc., R. Co., (1871) 62 Barb. 85, 12 Abb. Pr. N. S. 21; New York, etc., R. Co. v. New York, etc., R. Co., (1882) 11 Abb. N. Cas. 386; Matter of Boston, etc., R. Co., (1878) 10 Abb. N. Cas. 104. However, a map showing a single line with a note stating that the center line is a certain distance from a designated highway sufficiently denotes the route. Matter of Coney Island, etc., R. Co., (1877) 12 Hun 451.

Change of termini.— A map filed cannot control the charter of the corporation so as to change the termini or abandon a portion of the road, so that where a map of part of the distance between the termini is filed it will be deemed a partial map, to be supplemented by later maps showing the balance of the route. Mason v. Brooklyn City, etc., R. Co., (1861) 35 Barb. 373.

Effect of filing map.— "Clearly there is involved in these provisions the intention of the legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. The legislative scheme contemplated the determination of the line of route to be in the discretion of the company, to be exercised in the mode prescribed by law and its exercise, when in good faith and within the limits of its corporate powers, is only reviewable by the court in the case of an application by an occupant or owner of lands feeling aggrieved by the proposed location of the road. This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power; as is the right subsequently to acquire, in invitum, the right of way from the landowner and any land needed for the operation of its road. In this sovereign power is the source of the franchise, which the corporation possesses to construct and operate a railroad, and its grant is for public and not for private purposes. Public considerations enter into the grant of the franchise and public policy favors the enterprise for the public convenience and use. When therefore a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any landowner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct which ripens into title through purchase or condemnation proceedings." Rochester, etc., R. Co. v. New York, etc., R. Co., (1888) 110 N. Y. 128, 17 N. E. 680. But see New York, etc., R. Co. v. New York, etc., R. Co., (1882) 11 Abb. N. Cas. 386. However, the filing of a map is not the commencement of condemnation proceedings. "The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner because the constitution forbids it; it established none against the state, because its power is paramount, but as against all other railroad companies and as against all other creatures of the state empowered to use the right of eminent domain it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use." Accordingly the fact that a map has been filed showing a proposed route over premises creates no lien which prevents the state from acquiring the lands for a public park to the exclusion of the railroad, without making any compensation therefor. People v. Adirondack R. Co., (1899) 160 N. Y. 225, 54 N. E. 689, reversing 39 App. Div. 34, 56 N. Y. S. 869, affirmed (1900) 176 U. S. 335, 20 S. Ct. 460, 44 U. S. (L. ed.) 492. In that case the court limited to the particular case decided the language in Suburban Rapid Transit Co. v. New York, (1891) 128 N. Y. 510, 28 N. E. 525, a case arising under the Rapid Transit Act, which indicated that a lien was acquired by filing a map under this section which could not be divested by appropriation for a park. The mere filing of a map does not prevent the owner of lands on the proposed route from using it in any manner that he sees fit, or from disposing of it. New York, etc., R. Co. v. New York, etc., R. Co., (1882) 11 Abb. N. Cas. 386.

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III. Notice of Location

Necessity.— The service of notice on all landowners whose lands have not been acquired is a condition precedent to location and where some, but not all, have been served, condemnation proceedings will not lie against them, as the location of the route has not been legally made. Matter of Niagara Falls, etc., R. Co., (1887) 46 Hun 94, affirmed (1888) 108 N. Y. 375, 15 N. E. 429; People v. Lockport, etc., R. Co., (1878) 13 Hun 211; Matter of New York, etc., R. Co., (1871) 62 Barb. 85.

Form of notice.— A notice of location under this section signed by a named person followed by his official designation as an officer of the railroad corporation is sufficiently signed. Matter of Cortland, etc., Horse R. Co., (1883) 31 Hun 72, affirmed (1884) 95 N. Y. 663.

Service.— The service of notice on the occupants of lands must be personal service; any other service will not suffice. People v. Lockport, etc., R. Co., (1878) 13 Hun 211.

Notice to owner not occupant.— No notice to an owner of lands which is not an occupant thereof is required under this section, notice being required to be given to occupants. Matter of New York, etc., R. Co., (1884) 33 Hun 148, affirmed (1885) 98 N. Y. 664.

Notice to Public Service Commission.— This section has application to a time subsequent to the granting of a certificate of convenience under section 9 and does not require the consent of, or notice to, the Public Service Commission. Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627.

IV. Change of Location

Change of route, grade or terminus: see infra, § 24.
Substituted lines in certain cases: see infra, § 34.

Location prescribed by legislature.— The provisions of this section as to objections to the route do not apply to a railroad chartered by a statute specifying the route of the road. Matter of Coney Island, etc., R. Co., (1877) 12 Hun 451.

Who may petition for change.— No one but an owner or occupant of lands over which the proposed route passes can object to the location; the owner of neighboring premises cannot object. Matter of New York, etc., R. Co., (1884) 33 Hun 148, affirmed (1885) 98 N. Y. 664. A railroad whose road is to be intersected by another railroad which has filed a map of its route is not an "occupant or the owner of land aggrieved" who may petition for a change of route with respect to the place of intersection, but the procedure in such a case is governed by section 22. Matter of New York, etc., R. Co., (1888) 110 N. Y. 374, 18 N. E. 120. And see Matter of Lake Shore, etc., R. Co., (1882) 89 N. Y. 442. Even where such a proceeding is had under this section without objection the action of the commission does not abridge the right of a commission appointed under section 22 to prescribe the manner of intersection. Matter of Lake Shore, etc., R. Co., (1882) 89 N. Y. 442.

Duty to appoint commissioners.— "A railroad company, in determining upon its route, acts arbitrarily. It is not required to consult any one. No one in fact is entitled to any notice on the subject until the route has been actually designated, and the map and profile filed. Then, for the first time, the company is in a condition to notify the property holders whose land is to be taken. And any person feeling aggrieved may, within a certain time after written notice of the route, apply to a justice of the supreme court for the appointment of commissioners. These commissioners, on a hearing of the parties, are to affirm, or alter the route. It cannot be that the duty of examining the route is imposed on a justice of this court. The nature of the examination is such that he could not make it, It is to be made by commissioners, and one of them must, very properly, be a civil engineer. All that is to be done by the justice is to see that there is sufficient cause. This does not mean that he is to try the matter on its merits. For if that were the meaning, it is plain that practically there would never be any commissioners appointed. The selection of a route is a matter, to a great extent, determined by personal observation, and by that experience which an expert possesses. It was suggested that if commissioners were to be appointed in such cases great

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delay might ensue. But the statute gives power to the company to limit the time within which this application can be made. All they have to do is to notify the property holders. After such notice, the persons aggrieved have but a limited and short time within which to make this application. There need be no delay. And whenever there is reasonable ground of complaint as to the route, a route established merely by the will of the company, I think that the person feeling aggrieved should have a fair hearing before persons competent to settle the question." Norton v. Wallkill Val. R. Co., (1871) 61 Barb. 476.

Notice of application.— Where a petition is presented for a change of location notice must be given to the owners or occupants of lands affected by the change, and where it appears on the hearing that this has not been done the proceedings should be dismissed. One owning lands which will be taken by a proposed change of route is one to whom notice of the proceedings must be given though the center line of the altered route would not cross his lands. Norton v. Wallkill Val. R. Co., (1872) 63 Barb. 77.

Burden of proof.— The burden of proof, in a proceeding for a change of the route, is on the petitioner for the change. Norton v. Wallkill Val. R. Co., (1872) 63 Barb. 77.

View by commissioners.— On an objection to a route and the appointment of commissioners the determination of the commissioners may be founded upon a personal examination of the route and of the adjacent property as well as upon testimony. People v. Tubbs, (1872) 49 N. Y. 356.

Determination of commissioners.— "There is nothing in the statute which restricts the power of the commissioners over the proposed route to that part of it which lies within the bounds of the land of the party procuring their appointment. The effect of such a restriction would, except in very rare cases, be either to deprive the commissioners of the power to change a location unnecessarily prejudicial to the objecting party, or to compel them for the purpose of affording such remedy to make curves which would be a serious injury to the line, and might render it dangerous or impracticable. No change, of any considerable extent, can be made in the line of a railroad at a particular point without involving an alteration of the course to a greater or less distance in each direction; and the legislature has not been guilty of the absurdity of limiting the distance to which such necessary alterations may extend, by the boundaries of the land of the objecting party, or of making his right to relief depend upon the extent of the area of his land. When, upon the application of a person aggrieved by the proposed location, commissioners are appointed, they are required by the statute to examine and affirm or alter not that part of the line which runs through the premises of the objector which may be very limited in extent, but the proposed route. That clearly refers to the route referred to in the preceding part of the section, and of which a map is required to be filed, viz., the route intended to be adopted by such company in said county; and empowers them to make any alterations of such route which may be necessary to obviate such objections of the party aggrieved as they may decide to be well founded." People v. Tubbs, (1872) 49 N. Y. 356. "In exercising the power to alter the proposed route through the country it was the duty of the commissioners to complete the alteration so as to preserve the continuity of the zone, and not merely to point a portion of the road in a particular direction, leaving the company to find their way back to the main line. The commissioners were so to alter the route 'as might be consistent with the just rights of all parties and the public'; and for this purpose to examine the route and hear the parties. The whole alteration should be made by the commissioners, and their judgment should be exercised in respect to every part of it. We think that the statute contemplates but one board of commissioners in each county; and that all alterations to be made in the proposed route in such county should be made by that board. When it should become necessary to alter a line it could hardly be expected that several independent boards would exactly coincide, or harmonize in their action; and if the statute contemplated that several bodies of this description should operate upon the line in the same county, it is reasonable to suppose that provision would have been made for reconciling differences between them. The absence of any such provisions tends strongly to show that the appointment of but one board of commissioners was intended to be authorized. The board so appointed should therefore complete its work, either by affirming the route proposed by the

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company or making all the necesary alterations; and when this is done, the route through the county is established." People v. Tubbs, (1872) 49 N. Y. 356. That the statute contemplates but one commission also was determined in Matter of Long Island R. Co., (1871) 45 N. Y. 364. The commissioners must either confirm the route as originally laid down or confirm the proposed alterations and cannot lay down another route not so proposed. Matter of Niagara Falls Hydraulic Power, etc., Co., (1893) 68 Hun 391, 23 N. Y. S. 31, affirmed (1894) 143 N. Y. 669, 39 N. E. 21. This, however, does not preclude action by commissioners making the confirmation of the original route conditional on the contraction of its width at some point, within the lines originally laid down. Matter of Niagara Falls Hydraulic Power, etc., Co., (1893) 68 Hun 391, 23 N. Y. S. 31, affirmed (1894) 143 N. Y. 669, 39 N. E. 21.

Review by Appellate Division.— On an appeal to the Appellate Division the court is confined to a consideration of the evidence taken, and has not the benefit of a personal inspection, so that its review is confined to errors in the proceedings and the court will not substitute its judgment for that of the commissioners. Matter of Niagara Falls Hydraulic Power, etc., Co., (1893) 68 Hun 391, 23 N. Y. S. 31, affirmed (1894) 143 N. Y. 669, 39 N. E. 21.

Effect of failure to contest.— When a landowner fails to take proceedings to alter the route he cannot thereafter contest the question in condemnation proceedings to acquire his lands. Stillwater, etc., R. Co. v. Slade, (1899) 36 App. Div. 587, 55 N. Y. S. 966. The failure of a railroad company whose line is intersected by a new railroad to object to the route as required of carriers by this section does not affect its right to object to the manner of crossing and the lands to be taken in a proceeding under section 22. Matter of Boston, Hoosac Tunnel, etc., R. Co., (1879) 79 N. Y. 64.

§ 17. Acquisition of title to real property; additions, betterments and facilities. All real property required by any railroad corporation for the purpose of its incorporation or for any purpose stated in this chapter shall be deemed to be required for a public use, and may be acquired by such corporation. If the corporation is unable to agree for the purchase of any such real property, or of any right, interest or easement therein, required for any such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of any such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. Every railroad corporation shall have the power from time to time to make and use upon or in connection with any railroad either owned or operated by it, such additions, betterments and facilities as may be necessary or convenient for the better management, maintenance or operation of any such railroad, and shall have the right by purchase or by condemnation, to acquire any real property required therefor, and it shall also have the right of condemnation in the following additional cases:

1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

3. Where it shall require for any railroad owned or operated by it any further rights to lands or the use of lands for additional main tracks or for branches, sidings, switches, or turn-outs or for

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connections or for cut-offs or for shortening or straightening or improving the line or grade of its road or any part thereof. Also where it shall require any further rights to lands or the use of lands for filling any structures of its road, or for constructing, widening or completing any of its embankments or roadbeds, by means of which greater safety or permanency may be secured, and such land shall be contiguous to such railroad and reasonably accessible.

4. Where it shall require any further right to lands or to the use of lands for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, or for any other purpose necessary for the operation of such railroad, or for any right to take and convey water from any spring, pond, creek or river to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same, or for any right of way required for carrying away or diverting any water, stream or floods from such railroad for the purpose of protecting its road or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring the property of any person who may be rendered liable to injury thereby.

Waters commonly used for domestic, agricultural or manufacturing purposes, shall not be taken by condemnation to such an extent as to injuriously interfere with such use in future. No railroad corporation shall have the right to acquire by condemnation any right or easement in or to any real property owned or occupied by any other railroad corporation, except the right to intersect or cross the tracks and lands owned or held for right of way by such other corporation, without appropriating or affecting any lands owned or held for depots or gravel-beds.

[1]Whenever any real property is required by any steam surface railroad corporation, the lines of which within this state are situated wholly within a city of over one million inhabitants, for the purposes mentioned in this section, it shall be a condition precedent to the bringing, or, if heretofore brought, to the continuing of condemnation proceedings by any railroad corporation to acquire said real property that it procure the consent of the public service commission having jurisdiction of the district within which the land is situated, to acquire such real property, and unless such consent is given and procured the said property shall not be condemned. The last preceding requirement shall apply to all proceedings pending at the time this amendment takes effect.

This section was derived from the Railroad Law of 1890 as amended by L. 1892, ch. 676; L. 1905, ch. 727, §§ 2, 3. It was amended by L. 1913, ch. 284, in the manner indicated in the footnote.

[1] Remainder of section added.

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Power of condemnation generally: see supra, § 8.

Condemnation proceedings: see Code Civ. Pro., § 3357 et seq.

Estate or interest acquired by railroad in land purchased for right of way under state statute: see Ann. Cas. 1917B, 689, note.

Uses to which right of way may be devoted: see 36 L. R. A. (N. S.) 513, note.

Right of railroad company to condemn water over which right of way is constructed: see Ann. Cas. 1916D, 1215, note.

Condemnation or grant of land for right of way as carrying right to lateral and subjacent support: see 32 L. R. A. (N. S.) 155, note.

What constitutes notice to railroad company of adverse possession of its property: see Ann. Cas. 1917A, 1274, note.

Acquisition of prescriptive right of way across railroad tracks: see 35 L. R. A. (N. S.) 190, note; 48 L. R. A. (N. S.) 903, note.

Right to carry wires across railroad: see L. R. A. 1915B, 823, note.

Power of telegraph or telephone company to condemn railroad right of way under state statute: see Ann. Cas. 1917B, 689, note.

Measure of damages for right of way for telegraph or telephone line on railroad right of way: see L. R. A. 1916E, 582, note.

Condemnation of land for spur track to private establishment: see notes, 7 Ann. Cas. 835; 13 Ann. Cas. 1012; Ann. Cas. 1912D 234.

Right to dower in land conveyed to or condemned by railroad: see 21 Ann. Cas. 491, note.

Corporations within section.— The right to acquire real property under this section exists in favor of a foreign railroad corporation authorized by a special act of the legislature to construct a road within this state. New York, etc., R. Co. v. Welsh, (1894) 143 N. Y. 411, 38 N. E. 378, 42 A. S. R. 734; In re New York, etc., R. Co., (1889) 53 Hun 633 mem., 6 N. Y. S. 105. A corporation formed under a special act may bring proceedings under subdivision 1. Matter of Prospect Park, etc., R. Co., (1876) 67 N. Y. 371.

Proceedings by lessor.— This section confirms the right of a railroad corporation which has leased its line to maintain condemnation proceedings. Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27, affirming 35 Hun 220.

Proceedings by lessee.— A lessee may bring proceedings under this section. Long Island R. Co. v. Sherwood, (1912) 136 N. Y. S. 752.

Taking state lands.— By reason of the public use declared in this section state lands under water may be acquired for railroad uses. New York Cent., etc., R. Co. v. Matthews, (1911) 70 Misc. 567, 128 N. Y. S. 138.

Taking water supply.— The limitation as to taking waters commonly used for domestic, etc., purposes has been held to apply only to a taking of a water supply to furnish water to the railroad, and not to apply to a taking of lands for the railroad right of way. Erie, etc., R. Co. v. Brown, (1907) 57 Misc. 164, 107 N. Y. S. 983, affirmed (1908) 123 App. Div. 655.

Perfecting defective title.— It is no objection to a proceeding under subdivision 1 that the petitioner has constructed its road which is in operation. Matter of Prospect Park, etc., R. Co., (1876) 67 N. Y. 371.

Construction of cut-off.— Formerly subdivision 3 did not authorize the construction of a "cut-off" made to avoid a bad grade, which was held to constitute a change of route. Erie R. Co. v. Steward, (1902) 170 N. Y. 172, 63 N. E. 118, affirming 61 App. Div. 480, 70 N. Y. S. 698. "Under the former statute a railroad corporation after locating its route in the manner provided by the statute, was given the right to acquire a right of way six rods wide, either by purchase or by condemnation. This was deemed ample for the purposes of the corporation excepting cases of switches or turnouts or where lands were required for the constructing of embankments, etc., and it was accordingly held that where a railroad company had located its route and acquired its right of way it was bound thereby, and that it could not go outside of its right of way and acquire other lands except in cases specifically authorized by the statute. But owing to the marvelous growth of many of our cities and the great increase in travel and in the transportation of freight it became necessary that railroads, in order safely and properly to comply with the increased public demands, should have additional facilities, tracks, etc., in order properly to discharge their duties to the public. The legislature, recognizing the necessity for further facilities, by the act of 1915 gave to

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existing railroad corporations further powers with reference to the acquiring of lands for additions, betterments and facilities such as may be necessary and for additional main tracks or branches, sidings or connections or for cut-offs or for shortening or straightening or improving the line or grade of its road or any part thereof." Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169, reversing 147 App. Div. 895, 131 N. Y. S. 772, which affirmed 69 Misc. 383, 127 N. Y. S. 85.

Eliminating grade crossing.— Under this section adjacent lands may be acquired for the purposes of embankments and connections made necessary by the abolition of a grade crossing and for the purpose of laying additional tracks to facilitate the movement of trains. Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169, reversing 147 App. Div. 895, 131 N. Y. S. 772, which affirmed 69 Misc. 383, 127 N. Y. S. 85.

Construction of power line.— The construction of a line of poles and wires to carry electricity to a railroad is an "addition," "accommodation" or a "facility" within this section. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791.

Water mains on right of way.— This section has been held to authorize a railroad company to permit a water company to lay its mains on its right of way in consideration of furnishing the railroad water for railroad purposes, but it does not authorize the sale or delivery of water to the railroad for private purposes in a city where the water company has no franchise. Rochester v. Rochester, etc., Water Co., (1907) 189 N. Y. 323, 82 N. E. 154.

Condemnation of railroad lands.— By reason of the opening sentence lands acquired by purchase and used in connection with a railroad terminal are held for a public use which prevents their condemnation for another public use. Matter of New York, (1907) 52 Misc. 596, 102 N. Y. S. 500, affirmed on opinion below, 135 App. Div. 912, 120 N. Y. S. 839, affirmed (1910) 198 N. Y. 606 mem. By reason of this section lands adjacent to the tracks of a railroad are held for a public use, the public use not being confined to the land on which the tracks are laid. Matter of New York, (1908) 12 App. Div. 672, 111 N. Y. S. 916.

Acquisition of easement.— Subdivision 4 authorizes the acquisition of easements in lands. Allerton v. New York, etc., R. Co., (1910) 199 N. Y. 489, 93 N. E. 270.

Contiguity and accessibility.— It has been held that the requirement in subdivision 2 as to contiguity and accessibility applies only where the lands to be acquired are a source of earth and gravel. In re Long Island R. Co., (1892) 66 Hun 631 mem. 21 N. Y. S. 489.

Filing map.— The filing of a map under section 16 is not a prerequisite to a condemnation under this section. New York Cent., etc., R. Co. v. Ernst, (1906) 114 App. Div. 874, 100 N. Y. S. 175.

Determination of necessity.— The legislature has not delegated to railroad corporations the power of determining what lands are necessary to be appropriated for their use for the purposes of their incorporation but it is for the court to determine, upon the application of a railroad to acquire lands, the question of the extent and necessity of the appropriations and the landowner may contest this question. Matter of New York Cent. R. Co., (1876) 66 N. Y. 407. The burden of proving that additional lands are necessary to be acquired for any of the purposes specified by this section is on the railroad, and not on the objecting landowner. Matter of New York Cent. R. Co., (1876) 66 N. Y. 407.

Inability to purchase.— It is not necessary that the railroad be unable to buy the lands desired at any price; all that is required is either that the owner be unwilling to sell at all or be willing to sell at a price so large as is excessive in the good judgment of the railroad. Matter of Prospect Park, etc., R. Co., (1876) 67 N. Y. 371. Where the owner of lands demands an excessive price therefor and this is alleged there exists an inability to agree on the price for the purpose of condemnation. In re Long Island R. Co., (1892) 66 Hun 631 mem., 21 N. Y. S. 489.

Cited.— This section was cited in People v. State Board of Tax Com'rs, (1914) 160 App. Div. 771, 146 N. Y. S. 112; New York Cent., etc., R. Co. v. Untermyer, (1909) 133 App. Div. 146, 117 N. Y. S. 443, affirmed (1909) 196 N. Y. 531, 89 N. E. 1106; Rochester, etc., Water Co. v. Rochester (1903) 176 N. Y. 36, 68 N. E. 117 (per Bartlett, J., dissenting).

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§ 18. Railroads through public lands. The commissioners of the land office may grant to any domestic railroad corporation land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be required for the purposes of its road on such terms as may be agreed upon by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purposes of its road, may grant such land to the corporation for such compensation as may be agreed upon. In case the land or any right, interest or easement therein, required by such railroad corporation is used for prison purposes the commissioners of the land office may grant such land, or any right, interest or easement therein provided the plans of such railroad corporation for the use of such prison lands, or such right, interest or easement therein, have the approval of the superintendent of state prisons.

This section was derived from the Railroad Law of 1890, § 8, as amended by L. 1904, ch. 313, § 1.

Railroads in forest lands: see CONSERVATION LAW, § 55.

Grant of lands under water.— Under this section the commissioner of the land office may grant to a railroad lands under the Hudson river, or any waters, and it is not necessary that the railroad be an upland proprietor, but such a grant cannot deprive an upland owner of his riparian rights, including the right of access to the navigable waters. Saunders v. New York Cent., etc., R. Co., (1894) 144 N. Y. 75, 38 N. E. 992, 43 A. S. R. 729, 26 L. R. A. 378. See also Op. Atty.-Gen. (1897) 395.

Other state lands.— Title to lands of a state agricultural and industrial school may be obtained under this section. Op. Atty.-Gen. (1910) 936. And the same is true of lands of a state reformatory. Op. Atty.-Gen. (1901) 337.

Escheated lands.— Where a railroad company purchased lands from an alien after their escheat to the state, it was ruled that the commissioner of the land office might, under this section, grant them to the company in the same manner in which it had authority to grant any other lands of the state. Op. Atty.-Gen. (1892) 80.

Inability to purchase.— This section authorizes the condemnation of state lands under water for railroad purposes without, it seems, any previous attempt to agree with the commissioners of the land office upon terms. New York Cent., etc., R. Co. v. Matthews, (1911) 70 Misc. 567, 128 N. Y. S. 138.

Future requirements.— In acquiring state land in condemnation proceedings a railroad is not limited to its present necessities but may acquire lands for future use within reasonable limits. Matter of Staten Island Rapid Transit Co., (1886) 103 N. Y. 251, 8 N. E. 548.

Crossing canals.— In Op. Atty.-Gen. (1905) 297, this section was cited as bearing on the right to construct a railroad across a canal. See supra, § 8, note.

Cited.— This section was cited in People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting); Rumsey v. New York, etc., R. Co., (1889) 114 N. Y. 423, 21 N. E. 1066; Op. Atty.-Gen. (1905) 595.

§ 19. Railroads through Indian lands. Any railroad corporation may contract with the chiefs of any nation of Indians, over whose lands it may be necessary to construct its railroad, for the right to make such road upon such lands, but such contract shall

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not vest in the corporation the fee to the land, nor the right to occupy the same for any purposes other than may be necessary for the construction, occupancy and maintenance of such railroad, and such contract shall not be valid or effectual until it shall be ratified by the county court of the county where the land shall be situated.

This section was derived from the Railroad Law of 1890, § 9.
Indian land transactions: see CONSTITUTION, art. I, § 15.
Power of Indians to contract: see INDIAN LAW, § 2.
Validity.— It has been held that "it is not within the legislative powers of the state to enable the Indian nation to make, or others to take from the Indians, grants or leases of lands within their reservation" and that title acquired by a railroad under this section is invalid, a compliance with federal statutes as to acquiring Indian lands being essential. Buffalo, etc., R. Co. v. Lavery, (1894) 75 Hun 396, 27 N. Y. S. 443, affirmed on opinion below (1896) 149 N. Y. 576, 43 N. E. 986.

§ 20. Railroads through Chautauqua assembly grounds. No railroad corporation shall build, construct or operate any railroad in, upon, over or through the grounds, lands or premises owned by the Chautauqua assembly corporation in the town and county of Chautauqua, without the written consent of a majority of the board of trustees of such assembly corporation.

This section was derived from the Railroad Law of 1890, § 10.
Meaning of term "majority": see GENERAL CONSTRUCTION LAW, § 41.

§ 21. Railroads along highways. No railroad corporation shall erect any bridge or other obstruction across, in or over any stream or lake, navigated by steam or sail boats at the place where it may be proposed to be erected, except as hereinafter provided, nor shall it construct its road in, upon or across any street of any city without the assent of the corporation of such city, nor across, upon or along any highway in any town or street in any incorporated village, without the order of the supreme court of the district in which such highway or street is situated, made at a special term thereof, after at least ten days' written notice of the intention to make application for such order shall have been given to the superintendent of highways of such town, or board of trustees of the village in which such highway or street is situated. A railroad corporaiton may construct and maintain a bridge for the purposes of its railroad, over any creek within this state, navigated as aforesaid, provided that the consent of the public service commission be granted; and provided further, that in case such waters are used as a part of the canal system, that the consent of the canal board be obtained. Every railroad corporation which shall build its road along, across or upon any stream, watercourse, street, highway, plank-road or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plank-road and turnpike, thus intersected

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or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway, turnpike or plank-road may be carried by it, under or over its track, as may be found most expedient. In all cases where a railroad crosses a highway at grade, the corporation owning or operating such railroad shall construct and maintain a roadway at least sixteen feet wide. Such roadway shall be constructed by planking, or equally serviceable material for making a permanent road bed, which shall extend at least one foot outside of the outside rails through and across the entire space between the rails at such crossing. Where an embankment or cutting shall make a change in the line of such highway, turnpike or plank-road desirable, with a view to a more easy ascent or descent, it may construct such highway, turnpike or plank-road, on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary. Such lands so taken shall become part of such intersecting highway, turnpike or plank-road, and shall be held in the same manner and by the same tenure as the adjacent parts of the highway, turnpike or plank-road are held for highway purposes. Every railroad corporation shall pay all damages sustained by any turnpike or plank-road corporation in consequence of its crossing or occupation of any turnpike or plank-road, and in case of inability to agree upon the amount of such damages it may acquire the right to such crossing or occupation by condemnation.

This section was derived from the Railroad Law of 1890, § 11. It was amended by L. 1913, ch. 743. This amendment added the words "except as hereinafter provided" in the first sentence, and also the second sentence. It was further amended by L. 1916, ch. 109. This amendment added sentences 4 and 5.

I. In general, 52
II. Municipal consent, 53
III. Order of supreme court, 54
IV. Restoration of streams, 54
V. Restoration of highways, 55

I. In General

Petition for alteration of existing crossing, repair of bridges and subways, and expense of constructing new crossings: see infra, §§ 91, 93, 94.

New railroads across streets and new streets across railroads: see infra, §§ 89, 90.

Railroads in and upon highways: see Highway Law, § 146.

Street surface railroad tracks in street or highway: see Highway Law, § 142-a.

Abolition of railroad grade crossings: see Highway Law, § 145.

Proceedings by Public Service Commission for alteration of grade crossing: see infra, § 95.

Bridge over stream.— The Public Service Commission, and not the courts, is invested with powers to prescribe the conditions under which a bridge may be erected over a navigable creek. People v. Delaware, etc., R. Co., (1914) 213 N. Y. 194, 107 N. E. 506, modifying 154 App. Div. 909, 139 N. Y. S. 392.

Crossing canal.— In Op. Atty.-Gen. (1905) 297, this section was cited as bearing on the necessity of the consent of the superintendent of public works,

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under section 35 of the Canal Law, to a railroad across a canal. See supra, § 8, note.

Cited.— This section was cited in Matter of Erie R. Co., (1913) 208 N. Y. 486, 102 N. E. 562; People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting); Rochester Telephone Co. v. Ross, (1908) 125 App. Div. 76, 109 N. Y. S. 386, affirmed (1909) 195 N. Y. 429; Deming v. Terminal R. Co., (1900) 49 App. Div. 493, 63 N. Y. S. 615; Irvine v. Atlantic Ave. R. Co., (1896) 10 App. Div. 560, 42 N. Y. S. 1103, 23 App. Div. 112, 48 N. Y. S. 465; Barnes v. South Side R. Co., (1866) 2 Abb. Pr. N. S. 415.

II. Municipal Consent

Street railway.— A street surface railway cannot occupy a street without complying with section 171. Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845. An order of the court is not a sufficient consent to permit a street railway to cross a highway though in the particular case the railway is built on a private right of way, but the consent of the local authorities is necessary under section 171. In re Syracuse, etc., R. Co., (1909) 33 Misc. 510, 68 N. Y. S. 881.

Elimination of grade crossing.— Where it is sought to cross a highway on which there is a railway and to abolish a grade crossing section 91 et seq. relating to grade crossings are paramount and proceedings under those sections is all that is required. New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624.

Consent as condition to condemnation.— The fact that a railroad has not procured consent to a new crossing under this section is no bar to condemnation of other lands required, as it may subsequently procure such consent. Long Island R. Co. v. Sherwood, (1910) 69 Misc. 383, 127 N. Y. S. 85, 136 N. Y. S. 752, reversed on other grounds (1912) 205 N. Y. 1.

Power of Terminal Station Commission.— This section does not prescribe the body in a city which is to give its consent to the laying of tracks in a city street, and it was competent for the legislature to confide such powers as to the city of Buffalo in the Terminal Station Commission. McCutcheon v. Terminal Station Commission, (1916) 217 N. Y. 127, 111 N. E. 661, affirming 168 App. Div. 301, 154 N. Y. S. 711.

Conditional consent.— As a city may refuse to grant consent to a railroad to occupy a street it may impose conditions on granting its consent, and the courts cannot turn an offer to consent on certain conditions, even if illegal, into an absolute consent. People v. North Tonawanda, (1910) 70 Misc. 91, 126 N. Y. S. 186.

Consent to change of route of street.— The authority to carry a highway under or over a railway does not authorize a railroad, in constructing an overhead crossing, to change the route of a street. Bucholz v. New York, etc., R. Co., (1896) 148 N. Y. 640, 43 N. E. 76, reversing 66 Hun 377, 21 N. Y. S. 503.

Consent to overhead bridge.— The consent of the local authorities to crossing a street is essential though the crossing is to be by an overhead bridge and not at grade. Long Island R. Co. v. Sherwood, (1910) 69 Misc. 383, 127 N. Y. S. 85, reversed on other grounds (1912) 205 N. Y. 1. The consent of municipal authorities to the occupation of a street by an overhead crossing is not evidenced by a building permit for the structure. Delaware, etc., R. Co. v. Syracuse, (1908) 165 Fed. 631, 92 C. C. A. 41, modifying 157 Fed. 700. The consent of a city to the crossing of a street by a railroad on a bridge does not authorize the erection of abutments or piers for the bridge in the street in such a manner as to interfere materially with the public travel. Delaware, etc., R. Co. v. Buffalo, (1899) 158 N. Y. 266, 478, 53 N. E. 44, 533, affirming 4 App. Div. 562, 38 N. Y. S. 510.

Abandonment of consent.— Where a railroad has been granted consent to occupy a city street but for many years did not make use of the consent and then applied for a new consent, on the theory that the same was necessary, and subsequently obtained consent on conditions with which it complied, the original consent may be deemed abandoned. Delaware, etc., R. Co. v. Oswego, (1904) 92 App. Div. 551, 86 N. Y. S. 1027.

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Removal of unauthorized structures.— Where a railroad constructs tracks across a street outside its original right of way, without authority of law, it cannot require that an application for a removal of its tracks be denied on condition that it restore the highway under this section. People v. Gresser, (1912) 205 N. Y. 24, 98 N. E. 205.

III. Order of Supreme Court

Necessity.— Where it is sought to connect a street railway with a steam railway, making use of village streets for that purpose, the consent of the Supreme Court must be obtained where the municipality and the railroads cannot agree as to the method of crossing, under section 22. Ft. Edward v. Hudson Val. R. Co., (1908) 192 N. Y. 139, 84 N. E. 962, affirming 122 App. Div. 903, 106 N. Y. S. 1148. This section, so far as procuring an order of the Supreme Court is concerned, is not repealed by section 53 of the Public Service Commissions Law. Ft. Edward v. Hudson Val. R. Co., (1908) 192 N. Y. 139, 84 N. E. 962, affirming 122 App. Div. 903, 106 N. Y. S. 1148.

Grounds for denial.— The fact that a railroad in fact intends to operate as a street surface railway without complying with section 171 is good ground for denying its application for consent to occupy a village street. Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845; Matter of Keeseville, etc., R. Co., (1906) 116 App. Div. 72, 101 N. Y. S. 237. The fact that it may be more convenient and less expensive for a railroad to operate its road on a street may be considered, but is not conclusive, on an application for consent to use the street, and consent will be deemed where the street is narrow and much travelled and it is claimed that the road is in fact an electric road trying to avoid compliance with section 171. Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845.

Costs.— A proceeding to obtain an order under this section is a special proceeding and on a denial of the application costs may be awarded the opposing party as of an action. In re Lima, etc., R. Co., (1893) 68 Hun 252, 22 N. Y. S. 967.

IV. Restoration of Streams

Nonnavigable stream.— With reference to restoring streams this section applies merely to the public rights and does not require restoration of a non-navigable stream for the convenience of the owner of uplands. Kerr v. West Shore R. Co., (1891) 127 N. Y. 269, 27 N. E. 833.

Sufficiency of opening.— Where a railroad constructs a bridge across a stream it is its duty "to provide a bridge with an opening of sufficient capacity to meet all the ordinary exigencies of the climate and the situation of the stream, and also such extraordinary exigencies as experience would lead the people residing in that vicinity to believe might sometimes occur, although infrequently." Higgins v. New York, etc., R. Co., (1894) 78 Hun 567, 29 N. Y. S. 563.

Liability for negligence.— Where a railroad constructs a bridge across a stream a duty rests upon it, under this section, to minimize the interference with the flow of the water, so far as it reasonably can; and wilful or negligent aggravation of the obstruction is an actionable wrong. Howard v. Buffalo, (1914) 211 N. Y. 241, 105 N. E. 426, reversing 151 App. Div. 198, 122 N. Y. S. 1095, 135 N. Y. S. 303. So, it has been held that a railroad company is liable for damages done to lands by an overflow of a stream occasioned by improper construction of its road over the stream, though the lands affected are not situated on the stream. Brown v. Cayuga, etc., R. Co., (1855) 12 N. Y. 486. And, accordingly, it was ruled that the board of railroad commissioners had no jurisdiction to redress such private grievances. Op. Atty.-Gen. (1902) 294. The board of railroad commissioners has since been abolished. See generally Public Service Commissions Law.

Release of rights.— The advantage secured by this section to an individual owner in so far as the right to insist that a stream be restored is one which he may release or convey. Howard v. Buffalo, (1912) 151 App. Div. 198, 122 N. Y. S. 1095, 135 N. Y. S. 303, reversed in (1914) 211 N. Y. 241, 105 N. E. 426.

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V. Restoration of Highways

Private roads.— The provision of this section as to restoring highways has no application to private roads. Kerr v. West Shore R. Co., (1891) 127 N. Y. 269, 27 N. E. 833, 2 N. Y. S. 686.

Manner of restoration.— The manner of restoration may be determined solely by the railroad company, but it takes the risk of the manner being full performance of its obligation. Post v. West Shore R. Co., (1890) 123 N. Y. 580, 26 N. E. 7, aff'g 50 Hun 301, 3 N. Y. S. 172. Though undoubtedly a large measure of discretion rests with the railroad company still if it be made to appear that the restoration of the highway in one manner seriously affects its use though it still remains practicable to use it while by restoration in another manner the use would be wholly unimpaired we do not see how the company in adopting the first method can be said to have restored the highway to such a state as not to have unnecessarily impaired its use." People v. Delaware, etc., R. Co., (1904) 177 N. Y. 337, 69 N. E. 651, affirming 81 App. Div. 335, 81 N. Y. S. 478.

Culverts.— Under this section if a railroad obstructs the proper drainage of a highway it must construct proper culverts. Op. Atty.-Gen. (1908) 201.

Acquisition of additional lands.— Where the taking of additional lands is essential to restoration the railroad has power to acquire such lands. People v. Dutchess, etc., R. Co., (1874) 58 N. Y. 152. Accordingly where a railroad occupies a highway and widening is essential to restoration it may and should acquire lands for widening the highway. People v. Dutchess, etc., R. Co., (1874) 58 N. Y. 152.

Change of route of highway.— Where, in order to restore a highway, it becomes necessary to change its route the railroad may acquire additional lands for that purpose and the new highway becomes part of the legal highway. Post v. West Shore R. Co., (1890) 123 N. Y. 580, 26 N. E. 7, affirming 50 Hun 301, 3 N. Y. S. 172. Thus where a railroad crosses a highway in two places near together it may be compelled to abolish such crossings by changing the route of the highway, which is not objectionable as a discontinuance of a highway. People v. Dutchess, etc., R. Co., (1874) 58 N. Y. 152. However, it has been held that changing the route of a highway at a crossing and acquiring additional lands therefor is confined to a change made necessary by the existence of an embankment or cutting, and does not authorize a railroad to change the route of a highway in any other case. People v. Northern Cent. R. Co., (1900) 164 N. Y. 289, 58 N. E. 138, modifying 35 App. Div. 624, 54 N. Y. S. 1112; Bucholz v. New York, etc., R. Co., (1896) 148 N. Y. 640, 43 N. E. 76, reversing 66 Hun 377, 21 N. Y. S. 503. Where a railroad occupying part of a highway has removed the highway and placed it on an embankment its usefulness must be restored by rendering the new highway as safe as the old in the light of the new dangers thereby created. Allen v. Buffalo, etc., R. Co., (1897) 151 N. Y. 434, 45 N. E. 845.

Relocation of tracks.— Where a relocation of railroad tracks is necessary to comply with this section, it may be compelled. Op. Atty.-Gen. (1908) 204.

Railroad unlawfully in street.— The provisions of this section as to the restoration of highways does not apply to a railroad unlawfully laying tracks in a street. People v. Gresser, (1912) 205 N. Y. 24, 98 N. E. 205.

Railway along street.— A street surface railway which has constructed its line in the highway has not a route which "intersects or touches" the highway, hence the provision of this section as to restoration has been held not to apply to it. Queensbury v. Hudson Val. R. Co., (1912) 75 Misc. 197, 135 N. Y. S. 200. Negligence has been predicated on failure to restore a street on which a railroad runs lengthwise, however. Wasmer v. Delaware, etc., R. Co., (1880) 80 N. Y. 212, 36 Am. Rep. 608; Bell v. New York Cent., etc., R. Co., (1883) 29 Hun 560. And it has been held that under this section the lessee of a road occupying a city street must keep the space between its tracks in such condition that vehicles may readily cross the same, and for a failure in that respect, causing injuries to a traveller, it is liable in damages. Wasmer v. Delaware, etc., R. Co., (1880) 80 N. Y. 212, 36 Am. Rep. 608.

Grade of railroad.— On the question of the proper kind of crossing the grade of the railroad as established must be considered, and not the kind of a crossing which might have been made had the road been constructed on a different grade. People v. New York Cent., etc., R. Co., (1878) 74 N. Y. 302, affirming 12 Hun 195.

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Railroad bridge over street.— Where a railroad in carrying its road across a street by a bridge erects columns in the street in such a manner as to render the same dangerous for traffic it does not fulfill its duty under this section. New York, etc., R. Co. v. New York, (1915) 90 Misc. 178, 154 N. Y. S. 141.

Viaduct.— Where a railroad crosses a highway below grade and constructs a bridge carrying the highway over its tracks it need not necessarily make the bridge the full legal width of the highway, but must construct it of such width as not to impair its usefulness. People v. New York, etc., R. Co., (1882) 89 N. Y. 266.

Repair of bridges.— Originally where a railroad in restoring a highway carried it across its tracks on a bridge the duty of maintaining the bridge rested on the railroad, it not being a public bridge which the public authorities were bound to maintain. This rule, however, was changed as to the roadway of all such bridges by section 93. Murphy v. Ft. Edward, (1913) 158 App. Div. 342, 143 N. Y. S. 378; People v. Troy, etc., R. Co., (1869) 37 How. 427.

Planks at crossing.— This section imposes on a railroad a duty to keep the planking between its rails at a crossing in a reasonably safe condition and it is liable to one injured by a failure of duty in that respect. Masterson v. New York Cent., etc., R. Co., (1881) 84 N. Y. 247, 38 Am. Rep. 510; Gale v. New York Cent., etc., R. Co., (1879) 76 N. Y. 594; Bulin v. New York Cent., etc., R. Co., (1904) 100 App. Div. 42, 90 N. Y. S. 909.

Paving.— "It is undoubtedly true according to the decisions of this court and of the Supreme Court that under that provision a railroad company is not only bound to restore a street used by it to its former state so as not unnecessarily to impair its usefulness but is also bound to keep the portion of the street used by it in a reasonable state of repair. That certainly does not bind a railroad company whenever the municipality shall resolve to pave or repave a street to conform its repairs to the absolute directions and requirements of the municipality. In this case by virtue of the general railroad act this company could not be required to make the asphalt pavement. If it restored the street to its former usefulness and maintained it in that condition it discharged its whole duty under the general railroad act." Gilmore v. Utica, (1890) 121 N. Y. 561, 24 N. E. 1009, reversing 55 Hun 514, 9 N. Y. S. 912.

Abolition of grade crossing.— The provision requiring a railroad to restore a highway at a new crossing to its former state does not apply where on a petition under section 91 to eliminate a grade crossing the Public Service Commission orders a change of route both of the railroad and the highway, although in fact the street is crossed at another place, and the line of the street after crossing the tracks need not be restored on its former route. Danner v. New York, etc., R. Co., (1914) 213 N. Y. 117, 106 N. E. 1029, affirming 152 App. Div. 405, 137 N. Y. S. 270, 73 Misc. 113, 130 N. Y. S. 723. The fact that in connection with the abolition of a grade crossing a railroad contemplates laying additional tracks and changing its motive power does not throw on it the whole expense of eliminating the crossing, by reason of this section. Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 760, 121 N. Y. S. 524. Where, however, the abolition of a grade crossing is made necessary by a change in the grade of the railroad the railroad cannot petition for the change under section 91 so as to make the town bear part of the expense under section 94, but the railroad must restore the usefulness of the highway under this section. People v. Delaware, etc., Co., (1904) 177 N. Y. 337, 69 N. E. 651, affirming 81 App. Div. 335, 81 N. Y. S. 478.

Continuing nature of duty.— The duty to restore a highway under this section is a continuing duty. People v. New York Cent., etc., R. Co., (1878) 74 N. Y. 302, affirming 12 Hun 195; Cott v. Lewiston R. Co., (1867) 36 N. Y. 214 (watercourse); New York, etc., R. Co. v. New York, (1915) 90 Misc. 178, 154 N. Y. S. 141; Hatch v. Syracuse, etc., R. Co., (1888) 50 Hun 64, 4 N. Y. S. 509; People v. Troy, etc., R. Co., (1869) 37 How. Pr. 427. If, by an increase of business on highways, the facilities first provided become inadequate, the corporation must make such changes as are reasonably necessary to provide for the needs of the public. Hatch v. Syracuse, etc., R. Co., (1888) 50 Hun 64, 4 N. Y. S. 509. "The duty was not only to restore the road to its former condition but to maintain this condition in a reasonable way at least so far as its safety or usefulness was affected by its own acts and the

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ordinary operations of its business. The duty is not performed when the railroad restores the road on one day and destroys it on the next day. Though restoration may have been made yet if the railroad by its ordinary operations destroys the benefit of such restoration to the public and renders the road unsafe or unnecessarily impairs its usefulness the duty which accompanies the exercise of the franchise imposes upon the corporation the burden of further restoration and maintenance. Any other rule would permit a railroad that has once complied with the statute to destroy what it had done or to allow it to become useless or dangerous without being subject to any of the remedies in favor of the public that the statute contemplates." Allen v. Buffalo, etc., R. Co., (1897) 151 N. Y. 434, 45 N. E. 845.

Damages in prosecution of work.— This section imposes on a railroad engaged in restoring a highway the positive duty of exercising care and vigilance in the prosecution of the work which cannot, so far as the public are concerned, be delegated to an independent contractor so as to relieve it from liability for personal injuries. Deming v. Terminal R. Co., (1900) 49 App. Div. 493, 63 N. Y. 615, affirmed (1901) 169 N. Y. 1. A railroad company in restoring a highway to its original state of usefulness "stands in the place of the local authorities, with all their immunity from responsibility for any consequential damages, not attributable, of course, to negligence in the manner of performance," including the immunity which the municipality would enjoy on a change of grade. Rauenstein v. New York, etc., R. Co., (1893) 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768; Conklin v. New York, etc., R. Co., (1886) 102 N. Y. 107, 6 N. E. 663; Uline v. New York Cent., etc., R. Co., (1886) 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 666.

Jurisdiction over highways.— While the duty of restoration is a continuing duty its effect is not to withdraw the highway from the jurisdiction of the town superintendent of highways, who is still under a duty to keep it in repair. Bryant v. Randolph, (1892) 133 N. Y. 70, 30 N. E. 657.

Statute of limitations.— The duty being continuous the statute of limitations does not apply. Hatch v. Syracuse, etc., R. Co., (1888) 50 Hun 64, 4 N. Y. S. 509.

Remedies generally.— In Op. Atty.-Gen. (1902) 230, it was ruled that it was the highway commissioner's duty under section 15 of the Highway Law to compel a street railroad line to restore a highway as provided by the present section; that he could do this by an action in the name of the town or by proceeding under section 160 of the Railroad Law; but that it was preferable that the local authorities should first exhaust their remedies before invoking the remedy under section 160 of the Railroad Law.

Section 160 of the Railroad Law has since been repealed. But compare PUBLIC SERVICE COMMISSIONS LAW, § 45 et seq.

Mandamus.— The duty of restoring a highway to its former state of usefulness may be enforced by mandamus. People v. Northern Cent. R. Co., (1900) 164 N. Y. 289, 58 N. E. 138, modifying 35 App. Div. 624, 54 N. Y. S. 1112; People v. Troy, etc., R. Co., (1869) 37 How. Pr. 427. A private citizen may maintain a mandamus proceeding to compel a railroad to restore a highway to its former state of usefulness. People v. Northern Cent. R. Co., (1900) 164 N. Y. 289, 58 N. E. 138, modifying 35 App. Div. 624, 54 N. Y. S. 1112. Where a railroad claims to have restored a highway which is found not to be true in mandamus proceedings the writ may direct the manner of restoration as to direct restoration generally would be futile. People v. Dutchess, etc., R. Co. (1874) 58 N. Y. 152. Where the duty of restoration is sought to be enforced by mandamus the peremptory writ may direct restoration in a different and less onerous manner than the alternative writ, and in so doing is not objectionable as not compelling the doing of that which was required by the alternative writ. People v. Dutchess, etc., R. Co., (1874) 58 N. Y. 152.

Indictment.— For a failure to perform the continuing duty of reparation the remedy by indictment may be pursued. People v. New York Cent., etc., R. Co., (1878) 74 N. Y. 302, affirming 12 Hun 195.

§ 22. Proceedings to determine point at which a new railroad shall intersect one already established; compensation; duties of intersecting roads. Every railroad corporation, whose road is or

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shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor. If the two corporations can not agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law. Such commissioners may determine whether the crossing or crossings of any railroad before construction shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandise and other property, received at or forwarded from the same point for individuals and other corporations.

This section was derived from the Railroad Law of 1890, § 12, as amended by L. 1892, ch. 676.

Power to make connections: see supra, § 8.

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II. Connections and interchange of traffic, 59
III. Procedure, 60
IV. Defenses, 60
V. Determination of commissioners, 61

I. In General

Exclusiveness of remedy.— The provisions of this section as to procuring the right to cross another railroad, and settling the point of intersection, are exclusive and a railroad proposed to be intersected cannot procure a decision of the matter in proceedings to effect a change of route under section 16. Matter of New York, etc., R. Co., (1888) 110 N. Y. 374, 18 N. E. 120. And see Matter of Lake Shore, etc., R. Co., (1882) 89 N. Y. 442.

Repeal by Public Service Commissions Law.— The provision as to determining the manner of intersection is not repealed by section 53 of the Public Service Commissions Law. Ft. Edward v. Hudson Val. R. Co., (1908) 192 N. Y. 139, 84 N. E. 962, affirming 122 App. Div. 903, 106 N. Y. S. 1148.

Railway over viaduct.— Where a steam railroad has carried a highway across its tracks by an overhead bridge a street railway cannot use such bridge without proceedings under this section. Lake Shore, etc., R. Co. v. Chautauqua Traction Co., (1907) 54 Misc. 275, 104 N. Y. S. 550.

Crossing railroad owning fee.— The rule that property devoted to a public use cannot be acquired in condemnation proceedings does not preclude the acquisition of a right of crossing under this section, even though the railroad crossed owns the fee of its right of way. Hornellsville Electric R. Co. v. New York, etc., R. Co., (1894) 83 Hun 407, 31 N. Y. S. 745.

Additional tracks at crossing.— Where a two track railroad crossed by another desires to construct an additional track at the place of crossing on

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its right of way it need not proceed under this section. Buffalo Creek R. Co. v. New York Cent., etc., R. Co., (1916) 96 Misc. 462, 160 N. Y. S. 546.

Grade crossings.— "Upon the subject of the 'point of crossing' where the laws relating to crossings of railroads and grade crossings at public highways (§ 91 et seq.) are both applicable, that relating to grade crossings is paramount." New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624. It seems, however, that this section is not repealed by section 98, but that the proper procedure is to bring proceedings under this section to determine the point of crossing and compensation to be paid, and then apply under section 98 for a determination of the Public Service Commission as to whether the crossing shall be at, under or above grade. Olean St. R. Co. v. Pennsylvania R. Co., (1902) 75 App. Div. 412, 78 N. Y. S. 113, affirmed on opinion below (1903) 175 N. Y. 468, 67 N. E. 1086.

Street railway.— This section is applicable to a street railway which may acquire under it the right to cross a steam railroad. Buffalo, etc., R. Co. v. New York, etc., R. Co., (1893) 72 Hun 583, 25 N. Y. S. 265. In fact a street railway can cross the same only under an agreement or by proceedings under this section. People's R. Co. v. Syracuse, etc., R. Co., (1889) 51 Hun 643 mem., 22 Abb. N. Cas. 427, 6 N. Y. S. 326.

Gates at crossing.— A street railway which has acquired the right to cross a steam railroad cannot confer on a lessee operating a road by the overhead trolley system any greater rights than it possesses and if existing gates interfere with the trolley the lessee cannot compel their removal. Port Richmond, etc., Electric R. Co. v. Staten Island Rapid Transit Co., (1895) 144 N. Y. 445, 39 N. E. 392, affirming 71 Hun 179, 24 N. Y. S. 566.

Agreement as to crossing.— An agreement for crossing on certain terms as to rental is binding on consolidated corporations succeeding to the rights of their predecessors, and precludes a proceeding under this section, and this is true though prior mortgages on each railroad have been foreclosed since the agreement. Rome, etc., R. Co. v. Ontario Southern R. Co., (1879) 16 Hun 445. Agreement for intersection under this section is admissible in an action against the intersecting lines for damages growing out of a collision at the crossing. Cox v. Delaware, etc., Co., (1908) 128 App. Div. 363, 112 N. Y. S. 443.

Cited.— This section was cited in People v. Public Service Commission, (1911) 145 App. Div. 318, 130 N. Y. S. 97, affirmed (1901) 203 N. Y. 299; People v. Board of Railroad Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861 (per Parker, J., dissenting).

II. Connections and Interchange of Traffic

In general.— This section is not limited to crossings but is broad enough to permit the acquisition of a right to connect with an existing road near which a new road is constructed. Jennings v. Delaware, etc., R. Co., (1905) 103 App. Div. 164, 93 N. Y. S. 374, affirmed (1907) 190 N. Y. 544, 83 N. E. 1126.

Roads not actually intersecting.— The fact that two existing roads do not intersect but are separated by lands owned by private individuals does not preclude a proceeding seeking a connection and interchange of traffic where they are near together and public interest demands an interchange of traffic. New York, etc., R. Co. v. Erie R. Co., (1898) 31 App. Div. 378, 52 N. Y. S. 318.

Connection of street railway and steam railroad.— This section authorizes a compulsory connection and interchange of traffic between an electric street railway and a steam railroad. Matter of Stillwater, etc., R. Co., (1902) 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489, reversing 72 App. Div. 294, 76 N. Y. S. 69; Hudson Val. R. Co. v. Boston, etc. R. Co., (1905) 106 App. Div. 375, 94 N. Y. S. 545.

Compelling interchange of cars.— Where a connection of two roads has been compelled under this section an interchange of cars may be compelled after the connection has been made. Hudson Val. R. Co. v. Boston, etc., R. Co., (1905) 106 App. Div. 375, 94 N. Y. S. 545, affirming 45 Misc. 520, 92 N. Y. S. 928.

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III. Procedure

Nature of proceeding.— A proceeding under this section is not a condemnation proceeding, as the section means only that commissioners shall be appointed in the manner provided by the Condemnation Law. Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., (1912) 78 Misc. 220, 139 N. Y. S. 216.

Method of commencing proceedings.— A proceeding under this section may be commenced by notice of motion or order to show cause, and need not be instituted as a condemnation proceeding. Oneonta, etc., R. Co. v. Cooperstown, etc., R. Co., (1903) 85 App. Div. 284, 83 N. Y. S. 307.

Petition.— "What then must the petition state? Obviously that the petitioner is a corporation; that the route of its road as laid down by it crosses the other road; and that it desires to cross or intersect such road, specifying the place; and that the two corporations 'cannot agree upon the amount of compensation to be made therefor or the points and manner of such crossings and connections.' When the petition is presented to the court, under section fifteen the corporation whose road is to be crossed may appear and show cause against granting the prayer of the petition; and for that purpose it may put in issue the facts properly stated in the petition, and may disprove them." Matter of Lockport, etc., R. Co., (1879) 77 N. Y. 557, reversing 15 Hun 365, quoted in Oneonta, etc., R. Co. v. Cooperstown, etc., R. Co., (1903) 85 App. Div. 284, 83 N. Y. S. 307. All that is acquired under this section is a right of intersection, and not title to the lands, and the petition need not be such a one as would be necessary in condemnation proceedings. Matter of Lockport, etc., R. Co., (1879) 77 N. Y. 557, reversing 15 Hun 365. "The attempt and failure to agree is a condition precedent to the authority of the court to appoint commissioners and unless this is averred in the petition there is no jurisdiction." Matter of Boston, Hoosac Tunnel, etc., R. Co., (1879) 79 N. Y. 69. Where the allegation of an attempt to agree and inability to do so is controverted proof must be made on that subject before commissioners can be appointed. Matter of Lockport, etc., R. Co., (1879) 77 N. Y. 557, reversing 15 Hun 365.

Issues on application for commissioners.— All matters relating to the point and manner of intersection are for the determination of the commissioners and the court, or a referee, cannot, on the application for the appointment of commissioners, pass on such questions. Buffalo, etc., R. Co. v. New York, etc., R. Co., (1893) 72 Hun 583, 25 N. Y. S. 265.

Parties.— Proceedings under this section may be maintained against the lessee of a railroad, though of course the proceedings in such a case are not binding on the owner of the reversion. Matter of Boston, Hoosac Tunnel, etc., R. Co., (1879) 79 N. Y. 69. Where it is sought to connect a street railway and a steam railway, making use of a village street, the municipal authorities have a voice in the matter by virtue of section 21. Ft. Edward v. Hudson Val. R. Co., (1908) 192 N. Y. 139, 84 N. E. 962, affirming 122 App. Div. 903, 106 N. Y. S. 1148; Waverly v. Waverly, etc., Traction Co., (1909) 132 App. Div. 561, 116 N. Y. S. 1074.

Appeal.—An appeal will not lie from an order appointing commissioners. Stillwater, etc., R. Co. v. Boston, etc., R. Co., (1901) 67 App. Div. 367, 73 N. Y. S. 744. But see Matter of Saratoga Electric R. Co., (1890) 58 Hun 287, 12 N. Y. S. 318. An order confirming the report of commissioners also is appealable. Matter of New York, etc., R. Co., (1885) 35 Hun 232.

Costs.—A proceeding under this section is a special proceeding in which costs are in the discretion of the court, and where no question of compensation is involved costs may be granted to the petitioners. Matter of Cortland, etc., R. Co., (1885) 98 N. Y. 336. And see Hornellsville Electric R. Co. v. New York, etc., R. Co., (1894) 83 Hun 407, 31 N. Y. S. 745.

IV. Defenses

Want of necessary consents.— It seems that in a proceeding under this section the fact that the petitioner, a street railway in actual operation, has not procured the requisite consents to give it a legal right to occupy the highway is a good defense. Geneva, etc., R. Co., v. New York Cent., etc., R.

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Co., (1897) 24 App. Div. 335, 48 N. Y. S. 842; compare this case in (1900) 163 N. Y. 228. Matter of Saratoga Electric R. Co., (1890) 58 Hun 287, 12 N. Y. S. 318.

Invalidity of consents.— In a proceeding to acquire the right to cross the tracks of a railroad the railroad cannot attack the validity of assignable consents signed by abutting owners permitting the petitioner to occupy the highway. Geneva, etc., R. Co. v. New York Cent., etc., R. Co., (1900) 163 N. Y. 228, 57 N. E. 498, reversing 24 App. Div. 335, 631, 48 N. Y. S. 842, 1105.

Pendency of appeal under section 16.— The pendency of an appeal from an order refusing to change the route of a road under section 16 is no bar to proceedings under this section. Matter of New York, etc., R. Co., (1884) 33 Hun 270.

V. Determination of Commissioners

Necessity for final determination.—The commissioners should leave nothing undecided but should absolutely determine the manner of crossing, and it is error for them to leave the kind of frogs to be used open to further consideration on the failure of the parties to agree. Matter of New York, etc., R. Co., (1885) 35 Hun 232.

Damages.— Where no evidence is adduced on the question of damages for a crossing an award of nominal damages is sustainable. Matter of Cortland, etc., R. Co., (1885) 98 N. Y. 336.

Effect of report.— The report of the commissioners, when confirmed, operates as a voluntary contract between the parties and the duties imposed upon each are in the nature of covenants which may be enforced in an appropriate action. Matter of New York, etc., R. Co., (1885) 35 Hun 232.

§ 23. Highway exempted. No railroad shall be constructed, maintained or operated and no railroad tracks shall be laid upon the state road known as the Buffalo and White's Corners plank-road in the county of Erie, where none now exists, excepting such as may be necessarily laid for the purpose only of crossing said highway. The provisions of this section shall not affect any consents granted prior to the eighteenth day of April, nineteen hundred and five, or any rights acquired for the construction of any such railroad.

This section was derived from L. 1905, ch. 222, § 1.

Change of route of canal.— Where a change is made in the route of a canal a railroad crossing the same must bear the expense of changing its tracks, including the building of a temporary bridge. Op. Atty.-Gen. (1908) 276.

§ 24. Change of route, grade or terminus. Every railroad corporation, except elevated railroad corporations, may, by a vote of two-thirds of all its directors, alter or change the route or any part of the route of its road or its termini, or locate such route, or any part thereof, or its termini, in a county adjoining any county named in its certificate of incorporation, if it shall appear to them that the line can be improved thereby, upon making and filing in the clerk's office of the proper county a survey, map and certificate of such alteration or change. If the same is made after the corporation has commenced grading the original route, compensation shall be made to all persons for injury done by such grading to any lands donated to the corporation. But neither

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terminus can be changed, under this section, to any other county than one adjoining that in which it was previously located; nor can the route or terminus of any railroad be so changed in any town, county or municipal corporation, which has issued bonds and taken any stock or bonds in aid of the construction of such railroad, without the written consent of a majority of the taxpayers appearing upon the last assessment-roll of such town, county or municipal corporation, unless such terminus, after the change, will remain in the same village or city as theretofore. No alteration of the route of any railroad after its construction shall be made, or new line or route of road laid out or established, as provided in this section, in any city or village, unless approved by a vote of two-thirds of the common council of the city or trustees of the village. Any railroad corporation whose road as located terminates at any railroad previously constructed or located, whereby communication might be had with any incorporated city of the state, may amend its certificate of incorporation so as to terminate its road at the point of its intersection with any railroad subsequently located to intersect it, and thereby, by itself or its connection, afford communication with such city, with the consent of the stockholders owning two-thirds of the stock of the corporation. Any railroad corporation may, by a vote of its directors, change the grade of any part of its road, except that in the city of Buffalo such change must conform to the general plan heretofore adopted and filed by the grade crossing commissioners of said city, or any modification thereof, within the territory covered by said general plan, in such manner as it may deem necessary to avoid accidents and facilitate the use of such road; and it may by such vote alter the grade of its road, for such distance and in such manner as it may deem necessary, on each or either side of the place where the grade of its road has been changed by direction of the superintendent of public works, at any point where its road crosses any canal or canal feeder, except that in the city of Buffalo such change must conform to the general plan heretofore adopted and filed by the grade crossing commissioners of said city, or any modification thereof, within the territory covered by said general plan. The superintendent of public works shall have a general and supervisory power over that part of any railroad which passes over, or approaches within ten rods of any canal or canal feeder belonging to the state so far as may be necessary to preserve the free and perfect use of such canals or feeders, or to make any repairs, improvements or alterations in the same. Any railroad corporation whose tracks cross any of the canals of the state, and the grade of which may be raised by direction of the superintendent of public works, with the assent of such superintendent, may lay out a new line of road to cross such canal at a more favorable grade, and may extend such new line and connect the same with any other line of road

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owned by such corporation upon making and filing in the clerk's office of the proper county a survey, map and certificate of such new or altered line. No portion of the track of any railroad, as described in its certificate of incorporation, shall be abandoned under this section.

This section was derived from the Railroad Law of 1890, § 13, as amended by L. 1892, ch. 676; L. 1897, ch. 235.

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I. In General

Location of route: see supra, § 16.

Power of superintendent of public works with reference to railroads near canals: see Canal Law, § 35.

Time of proceedings.— This section clearly refers to proceedings subsequent to the granting of a certificate of convenience under section 9. Frontier, etc., R. Co. v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627.

Crossing canal.— This section contemplates that the manner and method by which a railroad shall cross a canal shall be supervised and acquiesced in, at least, by the superintendent of public works, and this supervisory power exists although the railroad preceded the canal. He may, accordingly, where a change is made necessary by the improvement of a canal grant the necessary easements in canal lands made necessary by a change of location of crossing. People v. Walsh, (1914) 211 N. Y. 90, 105 N. E. 136, reversing 159 App. Div. 252, 144 N. Y. S. 367.

Cited.— This section was cited in People v. Board of Railroad Com'rs, (1904) 92 App. Div. 126, 87 N. Y. S. 334, (per Chester, J., dissenting; see sec. 9); New York Cent., etc., R. Co. v. State, (1899) 37 App. Div. 57, 55 N. Y. S. 685; People v. Board of R. Com'rs, (1896) 4 App. Div. 259, 38 N. Y. S. 528, 861 (per Parker, J., dissenting; see sec. 9).

II. Change of Termini

Right to change.— The provision as to change of route or termini "has reference to the route as fixed originally by the corporate charter; . . . the change or alteration of route contemplated must be one affecting the line of road as laid out. . . . The right to change a terminus should be limited to such other location thereof as will subserve the operation of the existing road and its particular convenience in the transportation of passengers and of freight as an existing route." The section does not authorize an extension of the road into an adjoining county by a change of terminus. Greenwich, etc., R. Co. v. Greenwich, etc., R. Co., (1902) 172 N. Y. 462, 65 N. E. 278, affirming 75 App. Div. 220, 78 N. Y. S. 24.

What constitutes change.— The acquisition by a railroad of additional terminal facilities enlarging the area of territory necessary for tracks and other conveniences cannot be deemed a change of terminus. Matter of New York Cent., etc., R. Co., (1879) 77 N. Y. 248.

III. Change of Route Generally

Nature of change contemplated.— This section contemplates "that the object and limits of the change and alterations of the route and termini shall be an improvement of the line theretofore established. The context in the act shows that 'line' means the same as 'route.' By line is not meant the organization or the several particulars taken together which when used

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for the active affairs of the company might colloquially be termed the line. But it is that specific thing which taken by itself even before the company goes into active operation is called its line or its route. It is the direction which the rails are to take or which they may have taken and also the situation of the various structures connected with the rails in their relation in place to the latter. It is not a mere prolongation of the line unless such prolongation improves the direction of the part of the railway that has already been projected or constructed. It is not of course a prolongation for the purpose of increasing the revenue of the company because of the increased distance over which the cars may be run. That extension may not have any relation to an improvement of the former direction of the line. It may not change the direction at all." Webb v. Forty-Second St., etc., R. Co., (1881) 52 Misc. 46, 102 N. Y. S. 762.

Change to conform to franchise.— Where the consent of municipal authorities to the location of a railroad has specified a route other than that described in the articles of association a change of route to conform thereto may be made under this section. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Change by amendment of articles.— This section provides an exclusive method for effecting a change of route and such a change cannot be made by filing amended articles of association under section 7 of the General Corporation Law. Matter of Riverhead, etc., R. Co., (1899) 36 App. Div. 514, 55 N. Y. S. 938.

Change on abolition of grade crossing.— This section "applies only to a change of route or grade made primarily and solely for the benefit of the railroad company" and does not prevent the Public Service Commission from ordering a limited change of route on ordering the abolition of grade crossings under section 91. Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 756, 121 N. Y. S. 528. And see Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 760, 121 N. Y. S. 524. Changes in the grade and location of tracks made necessary in avoiding a grade crossing by elevating the tracks on a bridge are not a change of route within the meaning of this section. Long Island R. Co. v. Sherwood, (1912) 205 N. Y. 1, 98 N. E. 169, reversing 147 App. Div. 895, 131 N. Y. S. 772, which affirmed 69 Misc. 383, 127 N. Y. S. 85.

Change from street to private lands.— It has been held that a street railway cannot change its route from the street to private lands under this section. In re South Beach R. Co., (1889) 53 Hun 131, 6 N. Y. S. 172, affirmed (1890) 119 N Y. 14.

Abandonment of old route.— Where a street railway, with the consent of the local authorities, has changed its route but still to some extent uses the tracks on its old route such old route cannot be deemed abandoned. Forty-Second St., etc., R. Co. v. Cantor, (1905) 104 App. Div. 476, 93 N. Y. S. 943.

IV. Procedure

Action by directors.—An amendment of the articles of association is not essential to a change of route and where the directors vote to amend the articles by changing the route to a county adjoining that specified in the original articles this may be treated as a resolution changing the route. Matter of New York, etc., R. Co., (1882) 88 N. Y. 279, affirming 25 Hun 562.

Location of new route.— Where a change of route is effected by the board of directors the precise line of the new route need not be specified, as the location must be made under section 16 after the change has been effected. Matter of New York, etc., R. Co., (1882) 88 N. Y. 279, affirming 25 Hun 562.

Filing map.— The filing of a survey and map in the proper county clerk's office is a condition precedent to effecting a change of route, and the mere filing of a certificate of alteration is insufficient. Matter of Riverhead, etc., R. Co., (1899) 36 App. Div. 514, 55 N. Y. S. 938.

Consent of local authorities.— Where a change of route is desired under this section in the case of a railroad running through a village where the change is desired, procuring the consent of the village trustees is a condition precedent to the change. Erie R. Co. v. Steward, (1902) 170 N. Y. 172, 63 N. E. 118, affirming 61 App. Div. 480, 70 N. Y. S. 698. The fact that the

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commissioner of parks of a city has been invested with power to determine the location of railroad tracks or streets within his jurisdiction does not substitute him as the proper municipal authority to give the consent of the city under this section. Irvine v. Atlantic Ave. R. Co., (1896) 10 App. Div. 560, 42 N. Y. S. 1103.

§ 25. Change of gauge. Any railroad company incorporated under chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations and to regulate the same," and acts amendatory thereof and supplementary thereto, may change the gauge of its road on consent of the public service commission and approval of the stockholders of said railroad company owning three-fourths in amount of the capital stock, said approval of said stockholders to be made at a special meeting of the stockholders of said company called for that purpose; and upon like consent of said commission, and upon like approval of the stockholders of said railroad company owning three-fourths in amount of the said capital stock of said company, the floating and bonded indebtedness of said railroad company may be increased to an amount necessary to make such change of gauge and to provide for the operating expenses of said railroad, notwithstanding restrictions or limitations contained in the original certificate of incorporation of said railroad company.

This section was derived from L. 1891, ch. 267, § 1.
Weight of rail: see infra, § 51.

§ 26. Construction of part of line in another state. Any railroad corporation, whose proposed railroad is to be built between any two points in this state, may, by a vote of two-thirds of all its directors, locate and construct a part of its road in an adjoining state; and the sections of its road within this state shall be deemed a connected line, according to the certificate of incorporation, and the directors may reduce the capital stock of the corporation to such amount as may be deemed proper, but not less than ten thousand dollars per mile for the number of miles of road to be actually constructed in this state.

This section was derived from the Railroad Law of 1890, § 14.

§ 27. Two roads having the same location. If two railroad corporations for a portion of their respective lines embrace the same location of line, or if their lines connect, or are tributary to each other, such corporations may by agreement provide for the construction by one of them of so much of such line as is common to both, or connects with its own line, and for the manner and terms upon which the business thereon shall be performed, and the corporation that is not to construct the part of the line which is common to both, may amend its certificate of incorporation,

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and terminate its line at the point of intersection, and may reduce its capital to a sum not less than ten thousand dollars for each mile of road proposed to be constructed in such amended certificate.

This section was derived from the Railroad Law of 1890, § 15.

Shortening as affecting stock subscriptions.— The fact that a railroad has materially shortened its line under this section is no defense to an action by it on a subscription to stock. Troy, etc., R. Co. v. Kerr, (1854) 17 Barb. 581.

Cited.— This section was cited in Robinson v. New York, etc., R. Co., (1908) 123 App. Div. 339, 108 N. Y. S. 91, affirming 55 Misc. 516, 105 N. Y. S. 897 (per Ingraham, J., dissenting).

§ 28. Tunnel railroads. When, according to the route and plan for the building of its road, adopted by any railroad corporation, including corporations organized under chapter one hundred and forty of the laws of eighteen hundred and fifty, and the acts amendatory thereof, and supplementary thereto, it shall be necessary or proper to build it or any part of it underground, or to tunnel or bridge any river or waters, such corporation may enter upon, acquire title to and use such lands under water and uplands, except on or along any canals of the state, as shall be necessary for the purpose herein mentioned, and may construct, erect and secure the necessary foundations and other structures which may be required for operating and maintaining such road, or connecting the same with another, and to acquire, in the manner provided by law, such land or rights or easements in lands along its route, upon, over or beneath the surface thereof as may be necessary for the construction of its road and making such connections. Where such road runs underneath the ground, at such depth as to enable the corporation to tunnel the same, such tunnel shall be so built and at all times kept in such condition as to make the surface of the ground above the same and in the neighborhood thereof firm and safe for buildings and other erections thereon, and if surface excavations are made the surface shall be restored to its former condition as soon as can be done, except so far as may be actually required for ventilation of the tunnel beneath the same or access thereto. Such road or any part of it may be built within the limits of any city or incorporated village of this state, and run by means of a tunnel underneath any of the streets, roads or public places thereof, provided such corporation shall, before constructing the same underneath any such street, road or public place, have obtained the consent of the owners of one-half in value of the property bounded on the line of such street, road or public place, and the consent of the board of trustees of the village, by a resolution adopted at a regular meeting and entered on the records of the board, or of the proper authorities of the city having control of such streets, roads or public places. If the consent of such property owners can not be obtained, the appellate division of the

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supreme court in the department in which said city or village or any part thereof is situated, may upon application appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be built underneath such streets, roads or public places, or any of them, and in what manner the same may be so built with the least damage to the surface and to the use of the surface by the public and the determination of the commissioners confirmed by the court may be taken in lieu of the consent of the property owners. All railroad corporations constructing their road under this section shall be subject to all the provisions of this chapter applicable thereto. Any other railroad corporation may connect its road therewith, at such points or places as it may elect, and where such connections shall be made by connecting roads, the railroad corporations owning such roads shall build, at their joint expense, and for their joint use, such passenger and freight depots, and other accommodations for handling passengers and freight, as may be required for the convenience of the public. All railroad corporations constructing any tunnel under the provisions of this section shall be liable to any person or corporation for all damages which may be sustained by reason of the construction of such tunnel. Whenever it shall be necessary in constructing any railroad authorized by this section through any city or incorporated village, to alter the position or course of any sewer, or water or gas pipes, it shall be done at the expense of the railroad corporation under the direction of the department or corporation having charge thereof, so as not to interfere with such work. In all cases the use of streets, docks and lands beneath which such railroad is constructed, and on the route thereof and the right of way beneath the same, for the purpose of such railroad, shall be considered, and is hereby declared, a public use, consistent with and one of the uses for which streets and docks are publicly held. No public park or square in any city or village of this state shall be used or occupied by any corporation for any of the purposes of this section, and every road constructed hereunder in or through any such street or public place shall be wholly underground and constructed in a tunnel and not otherwise. But nothing in this section shall operate to revive any charter or franchise heretofore granted by or in the city of Brooklyn. This section does not authorize the construction of any bridge over or across the East or North rivers.

This section was derived from the Railroad Law of 1890, § 16, as amended by L. 1892, ch. 676; L. 1892, ch. 702; L. 1893, ch. 316, § 1.

Ventilation and lighting of tunnels: see infra, §§ 102, 103.

Constitutionality.—A railway operating wholly within a city and under its streets is a street railroad within Constitution, art. 3, sec. 18, and the predecessor of this section providing that in lieu of the consent of both the property owners and the municipal authorities an order of the Appellate Division should suffice was held unconstitutional as applied to such railways. Matter of New York Dist. R. Co., (1887) 107 N. Y. 42, 14 N. E. 187, affirming 42 Hun 621, 4 N. Y. St. Rep. 739. It was also held in the case

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last cited that the act was wholly unconstitutional so far as the provision as to an order was concerned, and that the provision could not stand as to property owners and fall as to the municipal authorities. But in the later case of New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113, it was held that under that act an underground railroad might be built where the consent of both the local authorities and the property owners was obtained, the provision as to the order as a substitute for consents being alone invalid.

Retroactive operation.— This section, in so far as it applies to corporations organized under the Act of 1850, is retroactive. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Subway as street railway.—A railroad constructed in pursuance of this section, a large portion of its route being under public waters and private property, is not a "street surface railroad" within section 170. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Effort to obtain consents.—A petition for the appointment of commissioners under this section must show an application to specified persons for their consents, the nature of the application, and that the persons to whom application was made owned at least one-half of the property bounded on the proposed railroad, and a statement of an endeavor to obtain the requisite consents, inability to do so, and that the affiant believes that the consents cannot be obtained because the property owners prefer that the railroad be built under the guaranties afforded by a legal proceeding under this section is insufficient. Matter of Broadway Underground R. Co., (1881) 23 Hun 693.

Cited.— This section was cited in People v. State Board of Tax Com'rs, (1911) 142 App. Div. 796, 127 N. Y. S. 858 (per Laughlin, J., dissenting).

§ 29. Railroads in other countries. A railroad corporation may be formed under this chapter for the purpose of constructing, maintaining and operating in any foreign country a railroad for public use in the transportation of persons and property, or for the purpose of maintaining and operating therein any railroad already constructed, in whole or in part, for the like public use, and of constructing, maintaining and operating, in connection therewith, telegraph lines and lines of steamboats or sailing vessels. Any corporation formed for the construction and operation of a railroad by stationary power, may construct, operate and maintain a railroad in any other state or country, if not in conflict with the laws thereof, but the assent of the inventors or patentees of the method of propulsion used must be first obtained in the same manner and to the same extent as would be necessary within the United States. The term "foreign" in this and the next section shall include Porto Rico.

This section was derived from the Railroad Law of 1890, § 17, as amended by L. 1892, ch. 676; L. 1902, ch. 225.

Liability for death by wrongful act.—A corporation organized to operate a railroad in a foreign country, under this section, stands in the same situation as an individual so far as its liability for death by wrongful act is concerned, and for a death occurring on its line in such foreign country no action under the statutes of this state can be maintained. Whitford v. Panama R. Co., (1861) 23 N. Y. 465; Crowley v. Panama R. Co., (1859) 30 Barb. 99.

Dissolution.—A corporation organized under this section is a railroad corporation and as such cannot be dissolved under the Stock Corporation Law. Op. Atty.-Gen. (1903) 230.

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§ 30. Additional corporate powers of such road. The corporation specified in the preceding section shall have the following additional powers:

1. To expend money in making preliminary examinations and surveys for its proposed railroad, telegraph lines, and lines of steamboats and sailing vessels, and in acquiring from foreign countries, nations or governments, the grants, concessions and privileges herein authorized.

2. To take and receive from foreign countries, nations and governments, such grants, concessions or privileges, for the construction, acquisition, maintenance and operation of railroads, telegraph lines and vessels, as may be consistent with the purposes of the corporation, and as may be granted and conceded to it, and to hold the same under such restrictions and with such duties and liabilities as may be fixed by the laws of such foreign country, nation or government, or as may be annexed to such grants or concessions.

3. To construct, acquire, maintain and operate the lines of railroad, telegraph and shipping provided for by its certificate of incorporation, and to take and hold by purchase or by voluntary grant such real estate and other property in foreign countries as may be necessary and convenient for the construction, maintenance and accommodation of such lines, and to sell, convey, mortgage or lease such real estate or other property; and to acquire by purchase or otherwise any railroad or lines of telegraph constructed or in process of construction in any foreign country, and any grants, concessions, franchises, rights, privileges and immunities relating thereto, and to issue therefor the capital stock of the company or any part thereof at such valuation or valuations and on such terms as may be agreed upon, and to mortgage or sell and convey such railroad or lines of telegraph constructed or in process of construction in any foreign country, and any grants, concessions, franchises, rights, privileges and immunities relating thereto, or any part of its property, to any person or corporation created by this or any other state or foreign government, subject to the laws of the country or countries where such property may be, and the power of sale hereby granted shall be exercised only by a majority of the entire board of directors of the corporation, with the written concurrence of the holders of two-thirds in amount of its capital stock.

4. To take and convey persons and property on its transportation lines by the power or force of steam or of animals, or by mechanical or other power, and receive compensation therefor subject to the laws of the place or country where the same are situated.

5. To acquire and use such real estate and other property in this state as may be necessary in the conduct of its business,

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but the value of such real estate held at any one time shall not exceed the sum of one million dollars.

This section was derived from the Railroad Law of 1890, § 18, as amended by L. 1897, ch. 504.

Powers of corporations organized to acquire and operate railroads partly in the state: see infra, § 147.

§ 31. Location of principal office of such road. Every such corporation shall maintain its principal office within this state and shall have during business hours, an officer or agent upon whom service of process may be made, and shall hold in this state at least one meeting of the stockholders in each year for the choice of directors, which shall be known as the annual meeting and be held at the time and place fixed by the by-laws of the corporation.

This section was derived from the Railroad Law of 1890, § 19, as amended by L. 1892, ch. 676.

Term "office of a corporation": see GENERAL CORPORATION LAW, § 3, subd. 9.

§ 32. Individual, joint-stock association, or other corporation may lay down and maintain railroad tracks in certain cases. Any individual, joint-stock association or corporation, engaged in any lawful business in this state, may, except in any city of the state, lay down and maintain such railroad tracks on or across any street or highway, not exceeding three miles in length, as shall be necessary for the transaction of its business, and to connect any place of business owned by them with the track of any railroad corporation, and render such place of business more accessible to the public, upon obtaining the written consent of the owners of all the lands bounded on and of the local authorities having control of that portion of the street or highway, upon which it is proposed to construct or operate such railroad. If the consent of such property owners can not be obtained, the appellate division of the supreme court of the department in which such railroad is to be constructed, may upon application appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and the amount of damages, if any, to be paid to such property owners, and their determination confirmed by the court may be taken in lieu of the consent of the property owners. But no such railroad shall be so located, graded, built or operated as to interfere with or obstruct the traveled part of any highway, or its use as a highway, or the use of any street or highway intersecting the same.

This section was derived from the Railroad Law of 1890, § 20.

Constitutionality.— This section, so far as it authorizes the taking of property, including the rights of abutters on a street or highway, is unconstitutional as the use is a private and not a public use. George Swart Mfg. Co. v. Van Der Hoof, (1910) 137 App. Div. 492, 121 N. Y. S. 842.

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Construction in city.— This section indicates an intent on the part of the legislature that railroads of the character here described shall not be constructed in cities. Hatfield v. Straus, (1907) 189 N. Y. 208, 82 N. E. 172, affirming 117 App. Div. 671, 102 N. Y. S. 934.

§ 33. Powers of electric light and power corporations. Whenever all of the stockholders of any domestic electric light and power company, incorporated under a general or special law, having not less than five stockholders, and actually engaged in carrying on business in this state, shall execute and file, in the offices in which its original certificates of incorporation are filed, an amended certificate of incorporation, complying in every other respect than as to the number of signers and directors, who shall not be less than five, with the provisions of this chapter, and in which certificate the corporate name of such corporation shall be amended by adding before the word "company," in its corporate name, the words, "and railroad," or the words, "railroad and land," such corporation shall have the right to build, maintain and operate by electricity as a motive power, a railroad or railroads, not exceeding twenty-five miles in length, and within that distance from the power station, and shall also have the right to acquire the property and franchises of a railroad company or companies owning such a railroad or railroads, already constructed, and so operated, and to maintain and operate the same, provided that the directors of such railroad company or companies and all of its or their stockholders shall first have assented in writing to the transfer of the property and franchises of such railroad company or companies, to such corporation; in which event and by the filing of such assent of directors and stockholders in the offices where the certificates of incorporation of the railroad company or companies were required to be filed, the rights, property and franchises of such railroad company or companies shall be transferred to, and shall vest in such corporation, and such corporation so acquiring such railroad or railroads shall be subject to all the provisions of this chapter with respect to the railroad property or properties and franchises, and shall have all the powers, rights and privileges conferred by this chapter upon railroad corporations; provided that no such corporation shall construct any railroad which is in whole or in part a street surface railroad without complying with the provisions of article five of this chapter. Upon filing such certificate, such corporation shall also have the right to acquire by gift or by voluntary purchase and sale land not exceeding two thousand acres along the line of, or contiguous to, said railroad, and to hold, improve, lease or sell same. Whenever any such corporation shall furnish power to any water-works corporation carrying on its business in the county, or in a county adjoining that in which the operations of such corporation are carried on, it may acquire the shares of the

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capital stock of said water-works corporation, and, if such corporation shall become the owner of all the stock of said water-works corporation, it may, on executing and filing a certificate in accordance with the requirements of section fifteen of the stock corporation law, become possessed of all the estate, rights, property, privileges and franchises of such water-works corporation, with the effect provided in said section. This section shall not confer any powers upon any corporation located in, or authorize the construction, maintenance or operation of a railroad in a city of the first or second class, except in that part of any city of the first class which is or may be situate in a county of less than one hundred thousand inhabitants, according to the last preceding enumeration for the national census.

This section was derived from the Railroad Law of 1890, § 21, as added by L. 1892, ch. 676, and amended by L. 1894, ch. 648; L. 1898, ch. 170; L. 1901, ch. 731.

Electric light corporations generally: see TRANSPORTATION CORPORATIONS LAW, § 60 et seq.

Organization tax.— On filing an amended certificate under this section no new organization tax need be paid. Op. Atty.-Gen. (1906) 464.

Effect of amended certificate.— Where an amended certificate of incorporation is filed under this section for the purpose of taking over a railroad less than twenty-five miles in length the certificate covers merely the route of the railroad then constructed and in operation. Public Service Commission v. Richmond, etc., R. Co., (1917) 163 N. Y. S. 64.

Railroad corporation.— It seems that an electric light and power company does not become a railroad corporation on filing a certificate under this section. Op. Atty.-Gen. (1912) 33.

§ 34. Substituted lines in certain cases. Where a portion of a steam surface railroad or branch thereof, shall be specifically authorized by statute to be taken for any other public use, and such portion lies wholly outside of any city, any corporation owning or operating such portion may locate, as provided in section sixteen of this article, and may construct and operate, in substitution for such portion, and with proper connections with the former line, a new line of steam surface railroad, wholly or partly in the same or any adjoining county, and wholly outside of any city, and not exceeding twenty-five miles in length, in the manner, with the powers and subject to the limitations and requirements provided in this chapter with respect to steam surface railroads.

This section was derived from the Railroad Law of 1890, § 22, as added by L. 1898, ch. 656, § 1.

§ 35. Canal corporation may construct railroad. It shall be lawful for any corporation of this state owning and operating a canal to construct and operate along or in lieu of such canal a railroad, and the exercise of the authority hereby conferred shall not be deemed to forfeit or impair its corporate rights under its charter or act of incorporation.

This section was derived from L. 1881, ch. 452, § 1.

Powers of superintendent of public works with reference to railroads near canals: see CANAL LAW, § 35.

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§ 36. Powers of such corporations. Such corporation in the construction and maintenance of any such railroad under the authority of the preceding section shall have, possess and enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and the several acts amending the same, and be subject to all the duties, liabilities and provisions, so far as relates to any powers or privileges conferred by the preceding section upon said corporation and exercised after June fourth, eighteen hundred and eighty-one.

This section was derived from L. 1881, ch. 452, § 2.

§ 37. Saving clause. Nothing in the two preceding sections contained shall authorize the construction of any railroad in any locality except upon or along such canal owned and operated by any such corporation.

This section was derived from L. 1881, ch. 452, § 3.

§ 38. Bridge companies in cities containing more than one million inhabitants. Any company incorporated for the purpose of constructing and maintaining a bridge or bridges over any river, bay, arm of the sea or other body of water, connecting different portions of any city in the state of New York containing more than one million inhabitants, is hereby empowered to lay tracks and operate a railroad upon said bridge or bridges.

This section was derived from L. 1893, ch. 225, § 1.
Bridge corporations generally: see TRANSPORTATION CORPORATIONS LAW, § 120 et seq.

§ 39. Change of time for holding elections. Any railroad company, the time for the annual election of directors in which is now fixed for any day in the month of June, may by a vote of the majority of its stock, either in person or by proxy, to that effect, and filing in the office of the secretary of state a copy of such proceedings, certified by the secretary of the company under its corporate seal, change the time for holding such annual election to any day in the month of April; provided, however, that the first election held under such resolution shall be held in the month of April which shall precede the time at which such election would otherwise have been held.

This section was derived from L. 1881, ch. 317, § 1.
Corporate elections generally: see GENERAL CORPORATION LAW, § 23 et seq.

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ARTICLE 3

Construction, Operation and Management

Section 50. Liability of corporation to employees of contractor.
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108. Approval of appliances in cities having a population of one million inhabitants or over.

§ 50. Liability of corporation to employees of contractor. An action may be maintained against any railroad corporation by any laborer for the amount due him from any contractor for the construction of any part of its road, for ninety or any less number of days' labor performed by him in constructing such road, if within twenty days thereafter a written notice shall have been served upon the corporation, and the action shall have been commenced after the expiration of ten days and within six months after the service of such notice, which shall contain a statement of the month and particular days upon which the labor was performed and for which it was unpaid, the price per day, the amount due, the name of the contractor from whom due, and the section upon which performed, and shall be signed by the laborer or his attorney and verified by him to the effect that of his own knowledge the statements contained in it are true. The notice shall be served by delivering the same to an engineer, agent or superintendent having charge of the section of the road, upon which the labor was performed, personally, or by leaving it at his office or usual place of business with some person of suitable age or discretion; and if the corporation has no such agent, engineer or superintendent, or in case he can not be found and has no

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place of business open, service may in like manner be made on any officer or director of the corporation.

This section was derived from the Railroad Law of 1890, § 30.

Payment of wages to railroad employees: see LABOR LAW, §§ 10, 11, 12, 13.

Liens for labor on railroads: see LIEN LAW, § 6.

Application of mechanics' lien laws to railroads: see notes, 7 Ann. Cas. 269; Ann. Cas. 1913C 95.

Who are laborers generally.—"The terms 'labor" and 'laborer' were used in their ordinary and usual sense; and the provision was intended to secure the common laborer, one who earned his daily bread by his toil, a compensation for his own work. The terms necessarily imply the personal service and work of the individual designed to be protected. The term 'laborer' cannot be construed as designating one who contracts for and furnishes the labor and service of others or one who contracts for and furnishes one or more teams for work whether with or without his own services or the services of others to take charge of the teams while engaged in the service. When once an enlarged meaning is given to the words 'laborer' and 'labor' as used in the statute, one more extensive than that given by lexicographers or than is popularly given to them and so as to include those who perform work by themselves as well as by agents and servants or themselves with a team or with mechanical appliances, there will be little difficulty in the effort to give a liberal effect to the statute to bring within its terms all who in any way contribute to the construction of the road by furnishing labor of others or in any form and by any means and without limit as to the amount or character to the labor subject only to the limitation of thirty days for its performance. If a man is entitled to the benefit of the statute who furnishes one team the man who furnishes fifty is within the same rule; and the fact that the man labors with or drives his team or by himself and his servants drive all his teams cannot affect the principle." Balch v. New York, etc., R. Co., (1871) 46 N. Y. 521. Likewise a person furnishing a servant and team on railroad construction work is not entitled to the benefits of this section. Cummings v. New York, etc., R. Co., (1869) 1 Lans. 68.

Necessity for express contract.—A contract to labor for a specified compensation is not requisite to a recovery under this section; an implied contract to pay what the labor is worth is sufficient. Chapman v. Utica, etc., R. Co., (1871) 4 Lans. 96.

Employee of subcontractor.—One who labors for a subcontractor is entitled to the benefits of this section. Kent v. New York Cent. R. Co., (1855) 12 N. Y. 628; Cummings v. New York, etc., R. Co., (1869) 1 Lans. 68.

Time of service of notice.—The notice under this section must be served within twenty days after the last day for which pay is claimed. Chapman v. Utica, etc., R. Co., (1871) 4 Lans. 96.

Manner of service.—Service of a notice on the chief engineer of the road, instead of the assistant engineer having charge of the section, is sufficient. Chapman v. Utica, etc., R. Co., (1871) 4 Lans. 96.

Reimbursement of railroad.—Where a railroad is compelled to pay laborers under this section it is entitled to reimbursement from the person who contracted with it to do the work. Moore v. Taylor, (1886) 42 Hun 45, 5 N. Y. St. Rep. 202.

Cited.—This article was cited in Forton v. Crosstown St. R. Co., (1909) 63 Misc. 237, 116 N. Y. S. 746 (see § 64); Riccio v. International R. Co., (1909) 63 Misc. 588, 117 N. Y. S. 720 (see § 64); Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see § 64).

§ 51. Weight of rail. The rail used in the construction or the relaying of the track of every railroad hereafter built or relaid in whole or in part shall be of iron or steel, weighing not less than twenty-five pounds to the lineal yard on narrow-gauge roads, and on all other roads not less than fifty-six pounds to the lineal yard on grades of one hundred and ten feet to the mile or under, and not less than seventy pounds to the lineal yard on grades of over

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one hundred and ten feet to the mile, except for turnouts, sidings and switches.

This section was derived from the Railroad Law of 1890, § 31.
Change of gauge: see supra, § 25.

§ 52. Fences, farm crossings and cattle-guards. Every railroad corporation, and any lessee or other person in possession of its road, shall, before the lines of its road are opened for use, and so soon as it has acquired the right of way for its roadway, erect and thereafter maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands, with farm crossings and openings with gates therein at such farm crossings whenever and wherever reasonably necessary for the use of the owners and occupants of the adjoining lands, and shall construct where not already done, and hereafter maintain, cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from going upon its railroad. So long as such fences and cattle-guards[1] are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animals thereon. When made and in good repair, they shall not be liable for any such damages, unless negligently or wilfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section, but barbed wire shall not be used in its construction.

No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands. Every adjoining land owner, who, or whose grantor, has received compensation for fencing the line of land taken for a railroad, and has agreed to build and maintain a lawful fence along such line, shall build and maintain such fence. If such owner, his heir or assign shall not build such fence, or if built, shall neglect to maintain the same during the period of thirty days after he has been notified so to do by the railroad corporation, such corporation shall thereafter build and maintain such fence, and may recover of the person neglecting to build and maintain it the expense thereof. And when such railroad shall cross timbered or forest lands, the company shall construct and maintain suitable and sufficient crossings, whenever and wherever reasonably necessary to enable the respective owners of said lands to transport logs, timber and lumber for manufacture or sale, or for banking on any stream, to be floated or driven down the same. In case of any neglect or dispute the supreme court may by

[1] Words " and cattle-guards " added.

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mandamus or other appropriate proceedings, compel the same, and also fix the point or location of any such crossing.

This section was derived from the Railroad Law of 1890, § 32, as amended by L. 1891, ch. 367; L. 1892, ch. 676. It was amended to read as above by L. 1915, ch. 281. The amendment is shown in the footnote.

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I. In General

Validity of statutes requiring railroads to construct fences and cattle guards: see 3 Ann. Cas. 182, note; 31 L. R. A. (N. S.) 861, note.

Excluding defense of contributory negligence and assumption of risk: see 31 L. R. A. (N. S.) 867, note.

Duty of railroad to blow whistle or give other warning to animal on track: see Ann. Cas. 1915B, 462, note.

Electric railway.—An interurban electric railway running on a private right of way falls within this section. Orafina v. New York State Rys., (1911) 148 App. Div. 417, 132 N. Y. S. 784. And see Evans v. Utica, etc., R. Co., (1904) 44 Misc. 345, 89 N. Y. S. 1089.

Foreign corporation.— The duties imposed by this section rest on a foreign corporation which has leased a line of railroad in this state. Buffalo Stone, etc., Co. v. Delaware, etc., R. Co., (1891) 130 N. Y. 152, 29 N. E. 121; Purdy v. New York, etc., R. Co., (1875) 61 N. Y. 353.

Company not in possession; lessee or receiver.— "The legislature evidently intended to visit upon a lessee, or a receiver in possession of the road, the same burden as was cast by the antecedent part of the section upon the owner" and there can be no recovery against a company not shown to have been in actual possession of a road, or a lessee thereof. Edwards v. Buffalo, etc., R. Co., (1896) 8 App. Div. 390, 40 N. Y. S. 788. Accordingly, where the bondholders of a railroad are in possession thereof they may be compelled to perform the duties imposed by this section. Jones v. Seligman, (1880) 81 N. Y. 190. Likewise a company in exclusive possession of tracks owned by another company which operates no trains is under the duties imposed by this section. Tracy v. Troy, etc., R. Co., (1868) 38 N. Y. 433, 98 Am. Dec. 54. But it seems that a railroad using a railroad under an arrangement with the owner thereof, who also operates trains thereon, is not liable under this section. Edwards v. Buffalo, etc., R. Co., (1896) 8 App. Div. 390, 40 N. Y. S. 788.

Enforcement of duty.— The duty to erect fences and maintain farm crossings may be enforced by an action in equity. Jones v. Seligman, (1880) 81 N. Y. 190. Failure to obey a writ of mandamus requiring a performance of the duties imposed by this section may be punished as a contempt of court. People v. Rochester, etc., R. Co., (1879) 76 N. Y. 294.

Burden of proof.— This section does not change the burden of proof in negligence actions and the plaintiff must show a neglect of duty, statutory or otherwise. Whaley v. Erie R. Co., (1905) 181 N. Y. 448, 74 N. E. 417.

Damages.— In an action for damages under this section interest is not recoverable as a matter of law but only as a matter of damages in the discretion of the jury. Hodge v. New York Cent., etc., R. Co., (1882) 27 Hun 394.

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Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664; Mattice v. Mattice, (1913) 81 Misc. 494, 143 N. Y. S. 487.

II. Fences

1. *In General*

Constitutionality of statutes relating to fixing value of stock killed on unfenced road: see 1 L. R. A. (N. S.) 867, note.

Necessity of uniformity of requirements as to fencing: see 31 L. R. A. (N. S.) 867, note.

Private action for violation of statutory duty to fence right of way: see 9 L. R. A. (N. S.) 347, note; L. R. A. 1915E 539, note.

Whether failure of railroad to fence its tracks was proximate cause of accident, as question of law or fact: see Ann. Cas. 1912D 454.

Violation of statute requiring fence not intended for plaintiff's benefit as actionable negligence: see notes, 9 Ann. Cas. 430; Ann. Cas. 1912D 1107.

Duty of railroad to fence as requiring barrier across culvert or under bridge: see British Rul. Cas. 182, note

Obligation of railroad company to employees as to fencing track: see L. R. A. 1916E 207 note.

Duty of lessee or licensee as to railroad fences: see Ann. Cas. 1917 A 539, note.

Duty of railroad to keep lookout for animals on track on fenced roads or where no duty to fence exists: see 3 Ann. Cas. 591, note.

Natural barrier.— "If there is a natural or artificial barrier which bars the way, then, as there is no necessity for one, no fence is required. But the statute does not permit the company to exercise a discretion depending upon the improbability of cattle going upon the tract where there is no barrier, natural or artificial, to prevent them, and under such circumstances it cannot be left to a jury to find whether the omission to fence was reasonably prudent or not." Kelver v. New York, etc., R. Co., (1891) 126 N. Y. 365, 27 N. E. 553. Whether a river located some distance from a railroad right of way, between which and its tracks the railroad owns all the land, is a sufficient barrier to excuse it from erecting a fence is a question for the jury. Klock v. New York Cent., etc., R. Co., (1891) 62 Hun 291, 17 N. Y. S. 120.

Application to railway in city.— This section requires fences between the right of way and vacant lots in cities according to an early case. Crawford v. New York Cent., etc., R. Co., (1879), 18 Hun 108. But inasmuch as it is unlawful to pasture horses in the streets of the city of New York a street railway situated on a private right of way adjoining a city street is not bound to erect a fence on the side of its road next to the highway to protect horses grazing in the street. Lee v. Brooklyn Heights R. Co., (1904) 97 App. Div. 111, 89 N. Y. S. 652.

Liability for loss of use.— A railroad neglecting to erect a fence as required by this section is liable to an adjoining owner for the loss of the use of his pasture lands adjoining the railroad, the liability created by the section not being exclusive. Leggett v. Rome, etc., R. Co., (1886) 41 Hun 80, 2 N. Y. St. Rep. 312.

Pleading.— The fact that the statute is not pleaded in an action for injury to an animal is immaterial where the issue is contested on the trial without objection. Rubein v. Brooklyn Heights R. Co., (1901) 61 App. Div. 478, 70 N. Y. S. 577.

2. *Kind and Height of Fence*

Buckthorn fence.—A buckthorn fence, constructed of a twisted flat ribbon wire with a saw edge, is not a barbed wire fence within the prohibition of the section. Stisser v. New York Cent., etc., R. Co., (1898) 32 App. Div. 98, 52 N. Y. S. 861.

Rail fence.— In an early case it was held that a railroad might build a "Virginia rail fence," or worm fence, the corner standing on the lands of the adjoining owner, such being the custom as to division fences. Ferris v. Van Buskirk, (1854) 18 Barb. 397.

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Barbed wire fence.— The prohibition on the use of barbed wire, first enacted by L. 1891, ch. 367, does not apply to fences erected before the prohibition was enacted. Stisser v. New York Cent., etc., R. Co., (1898) 32 App. Div. 98, 52 N. Y. S. 861; Guilfoos v. New York Cent., etc., R. Co., (1893) 69 Hun 593, 23 N. Y. S. 925. Even before the prohibition against barbed wire was enacted it was held a question for the jury whether such a fence was not of a dangerous character so as to render the railroad liable for injuries caused to cattle by it. Rehler v. Western New York, etc., R. Co., (1889) 55 Hun 604 mem., 8 N. Y. S. 286. The provision as to barbed wire was cited in Mattice v. Mattice, (1913) 81 Misc. 484, 143 N. Y. S. 487.

Height.— Where there has been no regulation in a town as to the proper heights of fences and a railroad has constructed a fence the height fixed by it is conclusive on it and if it suffers the fence, through decay, to become of much less height it will be deemed to have violated its duty to maintain the same. Leyden v. New York Cent., etc., R. Co., (1889) 55 Hun 114, 8 N. Y. S. 187.

3. *Places Excepted*

Stations, shipping yards, etc.— "From the necessity of business, many places adjacent to railways, such as railroad stations, shipping yards and the like," were evidently not included in the requirement as to fencing, and failure to fence at a loading platform does not subject the railroad to liability where animals were not likely to stray on the right of way there. Hyatt v. New York, etc., R. Co., (1892) 64 Hun 542, 19 N. Y. S. 461.

Business places adjacent.— Where a railroad has left a part of its lands unfenced in pursuance of its covenant with an adjoining owner of a mill it is not liable under this section for injury to horses driven on its right of way as a means of access to the mill, and there escaping to the tracks. "Many places adjacent to railroad stations which are not highways nor strictly station grounds are necessarily left unfenced for the accommodation of the adjoining owners and the public; and to hold that in all such cases a railroad is absolutely liable for an injury sustained by teams which enter on the track while in the care of their drivers without regard to the question of the negligence of their owners or drivers is to impose an unreasonable liability on the roads and one altogether foreign to the purposes of the statute." Dolan v. Newburgh, etc., R. Co., (1890) 120 N. Y. 571, 24 N. E. 824.

Railroad lands adjoining.—A railroad is required "in order to protect itself from the consequences of injury to cattle, to construct fences along the sides of its tracks even though the company owns the adjoining lands, unless there is some other physical barrier, either artificial or natural, upon which they can safely rely as a substitute for such fences." Klock v. New York Cent., etc., R. Co., (1891) 62 Hun 291, 17 N. Y. S. 120.

Parallel adjoining railroads.— Where the lines of two or more railroads are adjacent and the one owning the exterior right of way erects no fence, if cattle stray on its right of way and from thence on to the adjoining right of way, which is also unfenced, the owner of the latter is liable for injury to them. Kelver v. New York, etc., R. Co., (1891) 126 N. Y. 365, 27 N. E. 553. Where, however, fences are maintained on the exterior of two parallel lines of railroad, though there is no fence between the two rights of way, the exterior fence may be treated as the fence of both companies and where, without any negligence, an animal gets through a fence and crosses one right of way onto the tracks, the railroad maintaining the latter is not liable on the theory that it constructed no fence. Davison v. Delaware, etc., R. Co., (1909) 134 App. Div. 872, 119 N. Y. S. 369.

4. *Basis of Liability*

In general.— This section renders a railroad liable for injury to cattle straying on its right of way only when the fences are not in good repair or, if in good repair, when the damage is negligently or wilfully done. Whaley v. Erie R. Co., (1905) 181 N. Y. 448, 74 N. E. 417.

Failure to keep in repair.— "A literal reading of the statute (Laws of 1850, ch. 140, and 1854, ch. 282), requiring railroad companies to build and

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maintain fences along the sides of their tracks would make the railroad companies absolutely liable for all stock escaping and killed upon their tracks when such fences are not in good repair, irrespective of the question of negligence on the part of the company, or wrong or negligence on the part of the owner. It has, however, been repeatedly decided that such literal construction ought not to be given, and the rule is now established that any temporary defect must be brought to the notice of the railroad company and after such notice it must neglect to repair within a reasonable time, whereby cattle stray upon the road and are killed. This notice may be actual or positive, as when directly given to the proper agent of the railroad company, or it may be constructive, as when the defect is patent, easy to be seen, and has existed for so long a time before the damage done as to afford a reasonable presumption that the railroad company must have known of it through its agents, or else was guilty of independent negligence in not having, with proper diligence, examined the condition of its fences." Wheeler v. Erie R. Co., (1874) 2 Thomp. & C. 634. "Fences are liable to get out of repair; are liable to be blown down by sudden gusts of wind; to be let down by trespassers; to be destroyed by fire and other causes. It is the duty, however, of the railroad company, within a reasonable time, to cause them to be repaired. It is their duty to cause frequent examinations to be made to see if the fences are in repair, and if they neglect to do so they will be charged with negligence. Where they have actual notice that a fence is out of repair they are chargeable with negligence if they suffer it so to remain. Where fences are out of repair, and have been so for such a length of time that the company will be presumed to have had notice through its agents and servants, they are then chargeable with negligence, as having had constructive notice. Unless the company has actual or constructive notice of the defects in the fences, or are guilty of negligence in not making proper examination for the purpose of seeing whether the fences are in repair, there can be no recovery." Hodge v. New York Cent., etc., R. Co., (1882) 27 Hun 394.

Act of trespasser.— Where horses get on a railroad track through an adjoining fence which a trespasser has made unsafe, without any knowledge or fault of the railroad, the horses are trespassers and the railroad is liable only for reckless, wanton or malicious conduct. Boyle v. New York, etc., R. Co., (1886) 39 Hun 171, affirmed (1889) 115 N. Y. 636, 21 N. E. 724. But if the railroad did not acquire knowledge within a reasonable time and repair the defect it is liable under this section. Munch v. New York Cent. R. Co., (1859) 29 Barb. 647.

5. *Manner of Inflicting Injury*

Condition of premises.— Liability for injury to animals caused by a failure to fence is limited to such as is done by "agents, or engines or cars," so that a railroad is not liable under the section for injuries to animals straying on its right of way and injured by the condition of the premises, as by falling through a bridge. Jimerson v. Erie R. Co., (1911) 203 N. Y. 518, 97 N. E. 48, 37 L. R. A. (N. S.) 1181; Knight v. New York, etc., R. Co., (1885) 99 N. Y. 25, 1 N. E. 108. But see dictum tending to the contrary in Lee v. Brooklyn Heights R. Co., (1885) 97 App. Div. 111, 89 N. Y. S. 652. However, a railroad may be negligent in failing to erect a fence along its right of way, giving an adjoining owner a right of action for injury to his animal through falling into a cut, although there is no injury done by any engine or car; the ground of liability being negligence in violating the statute. Graham v. Delaware, etc., Canal Co., (1887) 46 Hun 386, 12 N. Y. St. Rep. 390.

Fright.—Injuries to animals on the right of way caused by being frightened by an engine and injuring themselves are not within this section. Hyatt v. New York, etc., R. Co., (1892) 64 Hun 542, 19 N. Y. S. 461.

Injury to passenger.— The duty imposed by this section is not solely for the benefit of the owners of animals but a violation gives a right of action to one on a train injured by a wreck caused by collision with an animal on the tracks. Donnegan v. Erhardt, (1890) 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527.

Injury to pedestrian.— This section is in no way intended for the benefit of pedestrians. Clark v. New York Cent., etc., R. Co., (1905) 104 App. Div. 167, 93 N. Y. S. 525.

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6. *Injury to Estrays*

Rule stated.— The fact that the animals were trespassers on the right of way is immaterial under this section. Crawford v. New York Cent., etc., R. Co., (1879) 18 Hun 108. The contrary was held in the early case of Brooks v. New York, etc., R. Co., (1852) 13 Barb. 594. And see contrary dictum in Wood v. Snider, (1907) 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912, wherein the question was in no way involved.

Rule applied.— Accordingly a railroad is liable for killing animals which stray on lands of an adjoining owner and from thence on the railroad through a defective fence. Purdy v. New York, etc., R. Co., (1875) 61 N. Y. 353; Rhodes v. Utica, etc., R. Co., (1875) 5 Hun 344; Shepard v. Pennsylvania R. Co., (1914) 86 Misc. 272, 148 N. Y. S. 388. And the fact that a horse traveled for some distance before straying on the railroad right of way is immaterial. Rubein v. Brooklyn Heights R. Co., (1901) 61 App. Div. 478, 70 N. Y. S. 577.

7. *Negligence of Owner of Cattle*

Unfenced road.— When the railroad has failed to erect proper fences the negligence of the owner of cattle does not preclude a recovery for injury to them. Corwin v. New York, etc., R. Co., (1855) 13 N. Y. 42, disapproving Marsh v. New York, etc., R. Co., (1852) 14 Barb. 364. Accordingly, a landowner pasturing cattle in his fields adjoining an unfenced railroad is not precluded from a recovery under this section. Shepard v. Buffalo, etc., R. Co., (1866) 35 N. Y. 641.

Defective fence.— "It is only before the requisite fences and cattle guards are duly made that a railroad company and its agent are made liable by statute for all damages done by their agents or engines to cattle, horses or other animals thereon notwithstanding the negligence of the owner cooperates in producing the damages. After such fences and guards are duly made and maintained the corporation is not liable for any such damages unless negligently or willfully done (Convin v. The New York and Erie R. R. Co., 3 Kern. 42); and then the person sustaining such damages by reason of the negligence of the corporation cannot recover if his own negligence in any way concurs in producing the damages." Hauce v. Cayuga, etc., R. Co., (1863) 26 N. Y. 428. But see Stimpson v. New York, etc., R. Co., (1881) 13 Wkly. Dig. 132. "There is no doubt that although the statute imposes upon the railroad company the absolute duty of maintaining fences, gates, etc., yet a duty in this respect also devolves upon the proprietors along the road. They have no right quietly to fold their arms and voluntarily to permit their cattle to stray upon the railroad track, through the known insufficiency of the fences which the corporation are bound to maintain. As it would be impracticable for the railroad company to keep a constant watch of every gate and every rod of fence along the line of its road, it is but reasonable to require of the proprietors, when defects have actually come to their knowledge, to make suitable efforts to apprise the company of such defects. In enforcing this rule, however, upon proprietors, care should be taken not to exempt the company, upon which the primary duty rests, from its due share of responsibility. It will be found impossible to define with precision the relative obligations of the parties in this respect, and it must result in most cases in a question to be addressed to the sound discretion of a jury." Poler v. New York Cent. R. Co., (1857) 16 N. Y. 476.

8. *Covenants of Landowner to Maintain*

Nature of covenant.—A covenant by one granting lands to a railroad, made before the railroad was under any duty to do more than build one-half of a division fence, releasing it from liability to maintain a fence, is not a covenant to build a fense within the meaning of this section. Shepard v. Buffalo, etc., R. Co., (1866) 35 N. Y. 641.

Effect on owner's rights.— So far as an adjoining owner is concerned where he has constructed a railroad fence, for pay, under a contract to build a sufficient fence he cannot recover damages on the theory that, as constructed, it was not sufficient. Morrison v. New York, etc., R. Co., (1860) 32 Barb.

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568; Tombs v. Rochester, etc., R. Co., (1854) 18 Barb. 583 (tenant); Talmadge v. Rensselaer, etc., R. Co., (1852) 13 Barb. 493.

Effect on rights of third person.— The fact that an adjoining owner had covenanted to maintain a railroad fence is no defense to the railroad when sued by another for killing cattle straying on the road for want of such fence. Corwin v. New York, etc., R. Co., (1855) 13 N. Y. 42; Shepard v. Pennsylvania R. Co., (1914) 86 Misc. 272, 148 N. Y. S. 388. However, one who hires pasture of an adjoining owner who has covenanted to maintain the railroad fence is in the same position as the adjoining owner and cannot recover damages due to a defect in the fence under this section. Duffy v. New York, etc., R. Co., (1859) 2 Hilt. 496.

Effect on adjoining railroad.— Where two railroads occupy adjoining rights of way the fact that the exterior railroad has been released from a duty of fencing by the adjoining owner does not preclude a recovery against the other railroad for injury to cattle straying over onto its right of way which is also unfenced. Shepard v. Buffalo, etc., R. Co., (1866) 35 N. Y. 641.

III. Cattle Guards

Duty of railroad company to keep cattle guards in condition: see 36 L. R. A. (N. S.) 997, note.

Effect of contributory negligence of cattle guard owner of stock getting on track through defects in cattle guard: see 36 L. R. A. (N. S.) 100, note.

Duty of railroad company to keep its cattle guards in condition: see L. R. A. 1915B, 134, note.

Private action for violation of statute as to building and maintenance of cattle guards: see L. R. A. 1915E, 539 note.

Liability for damage by trespassing cattle which enter upon railroad property because of absence of or defective condition of cattle guards and thence wander to adjoining property: see 43 L. R. A. (N. S.) 447, note; L. R. A. 1916E 448, note.

Street crossings.— The duty to erect cattle guards extends to street crossings and it is immaterial that the crossing is near a depot and a cattle guard would inconvenience the railroad. Tracy v. Troy, etc., R. Co., (1868) 38 N. Y. 433, 98 Am. Dec. 54; Bradley v. Buffalo, etc., R. Co., (1865) 34 N. Y. 427; Brace v. New York Cent. R. Co., (1863) 27 N. Y. 269. That the section requires cattle guards at street crossings also was held in Crawford v. New York Cent., etc., R. Co., (1879) 18 Hun 108; Brady v. Rensselaer, etc., R. Co., (1874) 1 Hun 378; Rubein v. Brooklyn Heights R. Co., (1901) 61 App. Div. 476, 70 N. Y. S. 577. The contrary was held in the early cases of Parker v. Rensselaer, etc., R. Co., (1873) 16 Barb. 315; Vanderkar v. Rensselaer, etc., R. Co., (1851) 13 Barb. 390.

Farm crossings.— The duty to erect cattle guards does not extend to farm crossings. Morrison v. New York, etc., R. Co., (1860) 32 Barb. 568; Brooks v. New York, etc., R. Co., (1852) 13 Barb. 594; Cross v. New York Cent., etc., R. Co., (1910) 123 N. Y. S. 908.

Defective guard as negligence.— Where a cattle guard is constructed but does not answer the requirement of the statute the railroad is liable under this section. White v. Utica, etc., R. Co., (1878) 15 Hun 333.

Estrays injured by absence of guards.—This section, as originally carried into the Consolidated Laws, provided that "so long as such fences" are not made, etc., the railroad should be liable for all damages, omitting cattle guards from the penalty, a departure from the original Act of 1854. While it so read it was held that the common law applied as to cattle guards and that the owner of estrays on a highway which trespassed on the railroad and were killed could not recover. Bateman v. Rutland R. Co., (1908) 126 App. Div. 511, 110 N. Y. S. 506, affirming 54 Misc. 312, 105 N. Y. S. 970. This defect was remedied by the amendment of 1915, replacing cattle guards within the provision for liability. It is not material from whence, or under what circumstances, the animals came upon the track, provided they were enabled to get there by the absence of cattle guards. Brady v. Rensselaer, etc., R. Co., (1874) 1 Hun 378; Sheaf v. Utica, etc., R. Co., (1873) 2 Thomp. and C. 388. A city ordinance prohibiting cattle from running at large is no defense to a railroad in an action for killing cattle getting on the right of

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way due to the absence of cattle guards. Crawford v. New York Cent., etc., R. Co., (1879) 18 Hun 108.

Estrays injured by defect in guards.— Where a railroad has properly constructed a cattle guard but has negligently permitted it to become ineffective by an accumulation of snow, there can nevertheless be no recovery for the killing of a cow straying over the cattle guard if its owner was negligent in permitting it to go at large. Hauce v. Cayuga, etc., R. Co., (1863) 26 N. Y. 428.

Cattle killed at crossing.— Cattle guards are intended to prevent cattle from straying laterally on the right of way and their absence gives no right of action against a railroad for killing cattle at a crossing. Martin v. New York Cent., etc., R. Co., (1897) 20 Misc. 363, 45 N. Y. S. 925.

Erection as negligence.— The erection of cattle guards as required by this section cannot be relied on as negligence because it somewhat obscures the view of the motorman on an interurban railway. Orafina v. New York State Rys., (1911) 148 App. Div. 417, 132 N. Y. S. 784.

IV. Farm Crossings

In general.— The provision as to farm crossings was formerly not so plain but the obligation to construct the same was held to exist. Peckham v. Dutchess County R. Co., (1892) 65 Hun 621 mem., 20 N. Y. S. 39.

Crossings in city.— This section, so far as the right to crossings is concerned, applies only to farming lands, and not to city property, and does not include a right of access to docks in a city, which cannot be acquired under this section, it seems. New York Cent., etc., R. Co. v. Marshall, (1907) 120 App. Div. 742, 105 N. Y. S. 686. This statement was characterized as dictum in New York Cent., etc., R. Co. v. Shaltemuc Yacht, etc., Club, (1908) 57 Misc. 482, 109 N. Y. S. 933, but the court did not find it necessary to pass on its soundness. But the same holding was made in the subsequent case of Matter of Grade Crossing Com'rs, (1913) 155 App. Div. 808, 140 N. Y. S. 882, reversed on other grounds (1913) 209 N. Y. 139.

Crossings for purposes not agricultural.— "The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals." Buffalo Stone, etc., R. Co. v. Delaware, etc., R. Co., (1891) 130 N. Y. 152, 29 N. E. 121.

Necessity of ownership on both sides of way.— The right to a farm crossing is not limited to persons owning lands adjoining the railroad right of way on both sides thereof. Buffalo Stone, etc., R. Co. v. Delaware, etc., R. Co., (1891) 130 N. Y. 152, 29 N. E. 121. But a court of equity will not require a farm crossing to be constructed where the owner has no lands to be reached thereby and it would be useless to him. Kerr v. West Shore R. Co., (1888) 2 N. Y. S. 686.

Conveyance without reservations.— This section is general and applies to cases where lands are purchased as well as where they are condemned, and the right to have farm crossings maintained is not waived by a conveyance of a right of way without reservations or exceptions. Smith v. New York, etc., R. Co., (1875) 63 N. Y. 58; Clarke v. Rochester, etc., R. Co., (1854) 18 Barb. 350.

Effect of reservation.— Where in a deed of a right of way there is an agreement that the grantor shall have "three surface grade crossings" this is an agreement as to his necessities precluding him from subsequently demanding an under grade crossing. Matter of Ellis, (1908) 12 App. Div. 111, 110 N. Y. S. 343.

Place of crossing.— The landowner cannot designate the place where a farm crossing shall be constructed, but the railroad has an election as to the place, subject to the risk of liability if the one constructed does not fulfill its duty. Wademan v. Albany, etc., R. Co., (1873) 51 N. Y. 568. The contrary had previously been held in Wheeler v. Rochester, etc., R. Co., (1851) 12 Barb. 227. "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land.

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The railroad corporation, in the exercise of its duty in providing farm crossings, is not vested with any such absolute discretion or arbitrary power that its decision is final and conclusive and cannot be reviewed or disturbed. While under the provision of the General Railroad Act, requiring the corporation to erect farm crossings, etc., for the use of the proprietors of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury . . . If the crossings made are insufficient in number, or improperly constructed, no reason exists why they should not be increased or improved, so as to be made convenient and useful. While their number or the conveniences furnished should not be unlimited, extravagant, or burdensome upon the corporation, the owner of the land is entitled, in a certain degree, to the advantages to be derived from a proper and fair exercise of this power. The nature of his rights must depend greatly upon the situation of the farm, and must be determined with due regard to the rules already laid down. The court may decide as to the kind and character of the crossing to be constructed, its necessity, and the place where it should be located." Jones v. Seligman, (1880) 81 N. Y. 190.

Kind of crossing.— Where it is inconvenient or impracticable to construct a grade crossing the railroad must furnish an under crossing. Wheeler v. Rochester, etc., R. Co., (1851) 12 Barb. 227.

Change of crossing.— Where a railroad has accepted a deed with a covenant to maintain a farm crossing as required by this section and thereafter has constructed an under crossing which has been used for many years, in the absence of a change of conditions it will be restrained from substituting a grade crossing therefor. Fox v. Buffalo, etc., R. Co., (1910) 67 Misc. 621, 123 N. Y. S. 183.

Damages as precluding crossing.—A railroad cannot resist a proceeding to compel it to construct an under grade farm crossing on the ground that damages caused by the inconvenience were allowed in condemnation proceedings where the manner of crossing was not there adverted to, though the inconvenience due to the water supply for cattle being cut off by the railroad was there considered. Beardsley v. Lehigh Val. R. Co., (1894) 142 N. Y. 173, 36 N. E. 877.

Defective crossing.— Where a railroad company, even in winter, removes the planking at a farm crossing rendering it unsafe it is liable to one rightfully using the same for injuries caused thereby. Smith v. New York, etc., R. Co., (1875) 63 N. Y. 58.

Remedy to procure crossing.—An injunction will issue against a railroad to restrain it from constructing its railroad without furnishing a proper farm crossing for an adjoining owner. Wheeler v. Rochester, etc., R. Co., (1851) 12 Barb. 227. Where there exists a right to a farm crossing under this section mandamus is an appropriate remedy to enforce the right. People v. New York, etc., R. Co., (1903) 175 N. Y. 483, 67 N. E. 1088. But where the right to a farm crossing exists by virtue of a covenant in a deed the court may refuse a mandamus and compel the petitioner to resort to an action on the covenant for specific performance or damages. People v. New York, etc., R. Co., (1903) 175 N. Y. 483, 67 N. E. 1088.

Awarding damages in lieu of crossing.— Where, in an equitable action, the court finds that a farm crossing as constructed is not, as to place, a fulfillment of its duty it may refuse to decree specific performance and award damages if the damages are less than the cost of a new crossing. Wademan v. Albany, etc., R. Co., (1873) 51 N. Y. 568. And if the court in an action to require the building of a farm crossing finds that it would be inequitable to require a crossing it may retain the case and assess the damages caused by the absence of a crossing. Clarke v. Rochester, etc., R. Co., (1854) 18 Barb. 350.

Joinder of actions.—An action based on a failure to maintain a farm crossing is not an action for an injury to real property and hence cannot be joined with an action for injuries to real property. Thomas v. Utica, etc., R. Co., (1884) 97 N. Y. 245.

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V. Gates at Crossings

Duty to construct.—A railroad is not relieved of the duty of maintaining gates at farm crossings by the fact that the deed to it binds it to maintain fences but says nothing as to gates. Poler v. New York Cent., etc., R. Co., (1857) 16 N. Y. 476.

Liability for negligence.— The duty to maintain fences includes the duty to see that the bars at farm crossings are closed and where such bars have been left open for a sufficient time to charge the railroad with knowledge it is liable to one, not an adjoining owner, whose animals stray through the opening and are injured. Connolly v. Central Vermont R. Co., (1896) 4 App. Div. 221, 38 N. Y. S. 587, affirmed (1899) 158 N. Y. 675, 52 N. E. 1124; Dayton v. New York, etc., R. Co., (1894) 81 Hun 284, 30 N. Y. S. 783. And a fence which is so constructed that a gate will open on the slightest pressure, which condition is known to the railroad or should be known, is structurally defective and for damages caused thereby the railroad is liable. Seeley v. Lake Shore, etc., R. Co., (1910) 67 Misc. 46, 122 N. Y. S. 216. Where negligence in leaving a gate open at a farm crossing is relied on it must be shown that the railroad had, or should have had, knowledge thereof. Hungerford v. Syracuse, etc., R. Co., (1887) 46 Hun 339, 12 N. Y. St. Rep. 204.

Liability in absence of negligence.— Where an animal strays through an open gate at a farm crossing the railroad is not liable unless it was negligent in not keeping the gate closed. Davison v. Delaware, etc., R. Co., (1909) 134 App. Div. 872, 119 N. Y. S. 369; Whaley v. Erie R. Co., (1905) 181 N. Y. 448, 74 N. E. 417. With respect to open gates the railway is liable only if it knew or should have known that the gate was open, but imputation of such knowledge arises where the gate was customarily left open in connection with traffic to the railway station. Spinner v. New York Cent., etc., R. Co., (1876) 67 N. Y. 153.

Contributory negligence.— Where a railroad is negligent in permitting a gate at a farm crossing to become defective the adjoining owner cannot recover for the death of an animal going through the open gate if slight care or effort on his part would have remedied the defect or prevented the damages, his contributory negligence contributing thereto and preventing a recovery. Magilton v. New York Cent., etc., R. Co., (1896) 11 App. Div. 373, 42 N. Y. S. 231.

Proximate cause.— The fact that because of a defective fastening in a gate one driving cattle across tracks was delayed in closing a gate does not render the railroad liable for killing cattle which he thereby was unable to drive across in time to avoid a train. Cross v. New York Cent., etc., R. Co., (1910) 123 N. Y. S. 908.

§ 53. Sign boards, [1]flagmen and gates[2] at crossings. Every railroad corporation shall cause a sign board to be placed, well supported and constantly maintained, at every crossing where its road is crossed by a public highway at grade. Such sign board shall be of a shape and design to be approved by the public service commission, and shall have suitable words painted thereon to warn travelers of the existence of such grade crossing. The commission shall have power to prescribe[3] the location and elevation of such sign and the words of warning thereon. The commission may dispense with the use of such sign boards at such crossings as it may designate in cities and villages. At any point where a steam or electric[4] railroad operating upon private right of

[1] Word "and" omitted.
[2] Words "and gates" new.
[3] Formerly "describe."
[4] Words "steam or electric" new.

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way[5] crosses a street, highway, turnpike, plank-road, or traveled way at grade, and where there shall not be an unobstructed view in either direction along such steam or electric railroad for a distance of two hundred feet each way on such street, highway, turnpike, plank-road or traveled way, the corporation owning or operating such steam or electric railroad must upon order of the public service commission as hereinafter provided station a flagman or erect gates to be opened and closed when an engine or train passes, and[6] where a steam railroad crosses a street railroad at grade, and the corporation owning or operating such railroad, refuses [7]to station a flagman or erect gates, to be opened and closed when an engine or train passes, the public service commission may, upon [8]application, [9]order that a flagman be stationed at such point, or that gates shall be erected thereat, and that a person be stationed to open and close them when an engine or train passes, or may make such other order respecting the same as it deems proper. Whenever the crossing by a railroad at grade of the streets, highways, turnpikes, plank-roads or traveled ways of any village or city, having a population by the last state or federal enumeration of less than fifty thousand, shall be protected by gates with persons to open and close the same, when an engine or train passes, the local authorities of the city or village shall not impose any limitation, less than forty miles an hour, on the rate of speed at which such engine or train shall be run, or enforce any existing limitation upon such rate of speed, less than forty miles an hour.

This section was derived from the Railroad Law of 1890, § 33, as amended by L. 1892, ch. 676; L. 1901, ch. 301. It was amended by L. 1915, ch. 559. The amendments are shown in the footnotes.

Power of village trustees to enact ordinances compelling railroad companies to erect gates at crossings and to employ competent flagmen: see VILLAGE LAW, § 90, subd. 10.

Guard posts: see PENAL LAW, § 1988.

Validity of statute empowering municipality to abolish grade crossings: see Ann. Cas. 1915A 76, note.

Power of municipality to require safety gates at railroad crossings: see 45 L. R. A. (N. S.) 946, note.

Jurisdiction of public service commission to make regulation respecting grade crossings: see Ann. Cas. 1915C 1289, note.

Duty of railroad company as to crossing which appears to be part of highway: see 51 L. R. A. (N. S.) 1215, note.

Violation of statute or ordinance in relation to blocking crossing as affecting liability: see 47 L. R. A. (N. S.) 821, note.

Private action for violation of crossing regulation: see L. R. A. 1915E 535, note.

Power to compel railroad company to establish or maintain at its own expense an overhead or underground highway crossing: see L. R. A. 1915E 751, note.

[5] Words "operating upon private right of way," new.

[6] Words "way at grade, and where there . . . when an engine or train passes, and," substituted for word "or."

[7] Words "upon request of the local authorities," omitted.

[8] Word "the" omitted.

[9] Words "of the local authorities and upon ten days' notice to the corporation," omitted.

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Liability for frightening horse on highway by flagman or warning device at crossing: see L. R. A. 1917C 982, note.

Constitutionality.— Formerly this section required the construction and operation of gates at a crossing when required by an order of the Supreme or County Court and this provision was held constitutional. People v. Long Island R. Co., (1892) 134 N. Y. 506, 31 N. E. 873, affirming 58 Hun 412, 12 N. Y. S. 41.

Duty to erect gates.— In the absence of an order to erect gates no absolute duty to erect them exists. Daniels v. Staten Island Rapid Transit Co., (1891) 125 N. Y. 407, 26 N. E. 466; Martin v. New York Cent., etc., R. Co., (1897) 20 Misc. 363, 45 N. Y. S. 925.

Compelling erection of gates.— Formerly the installation of gates or placing of a flagman could be procured only on action by the "local authorities," which was held confined to the superintendent of highways in towns. Pawling v. New York, etc., R. Co., (1911) 144 App. Div. 791, 129 N. Y. S. 643; Matter of Highway Com'rs, (1893) 72 Hun 575, 95 N. Y. S. 231.

Wilful failure to operate gates.— A wilful failure to operate gates when the same has been duly required may be punished as a violation of section 1857 of the Penal Law. People v. Long Island R. Co., (1892) 134 N. Y. 506, 31 N. E. 873, affirming 58 Hun 412, 12 N. Y. S. 41.

Signal bell.— This section authorizes an order requiring a signal bell to be maintained at a crossing. Matter of Highway Com'rs, (1893) 74 Hun 46, 48, 26 N. Y. S. 293, 385.

Flagman.— Subdivision 10 of section 90 of the Village Law, permitting villages to enact ordinances requiring gates or flagmen at crossings, was not repealed by this section. Depew v. Lehigh Val. R. Co., (1914) 85 Misc. 71, 148 N. Y. S. 265. An order requiring a flagman to be stationed at a crossing was sustained in Matter of Highway Com'rs, (1893) 74 Hun 44, 26 N. Y. S. 384. A bicyclist attempting to cross over a grade crossing in spite of the fact that the flagman was waving his flag and had stopped others is guilty of contributory negligence barring recovery and it is immaterial that signals were not sounded by the locomotive or that a depression in the road bed might have obscured an approaching train. Hoyt v. Long Island R. R. Co., (1917) 176 App. Div. 371.

Failure to erect sign board.— Failure to erect a sign board at a crossing in compliance with this section may constitute negligence as to one unfamiliar with the fact that a crossing existed there, who would have been warned if a proper sign board had been erected. Lewis v. Long Island R. Co., (1900) 162 N. Y. 52, 56 N. E. 548, reversing 30 App. Div. 410, 51 N. Y. S. 558; Henn v. Long Island R. Co., (1900) 51 App. Div. 292, 65 N. Y. S. 21.

Gates as excusing caution.— "It is well settled that a traveller approaching a crossing guarded by gates is not required to exercise the same vigilance to look and listen as when he approaches one not so guarded." Kane v. New York, etc., R. Co., (1892) 132 N. Y. 160, 30 N. E. 256. To like effect see Oldenburg v. New York Cent., etc., R. Co., (1891) 124 N. Y. 414, 26 N. E. 1021; Palmer v. New York Cent., etc., R. Co., (1889) 112 N. Y. 234, 19 N. E. 678; Glushing v. Sharp, (1884) 96 N. Y. 676.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664.

§ 54. Notice of starting trains; no preferences. Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the

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fare or freight legally authorized therefor. No station established by any railroad corporation for the reception or delivery of passengers or property, or both, shall be discontinued without the consent of the public service commission first had and obtained. No preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations or corporations competing in the same business, or in the business of transporting property for themselves or others. Any such station in an incorporated village shall have the same name as the village; if any road shall have more than one such station in any such village the station nearest the geographical center thereof shall have such name. [1]Names of stations may be changed on the petition of any person interested with the consent of the public service commission. [1]If the name of any station has been heretofore changed by the railroad company, the commission may restore the name changed or make such change therein as the circumstances require.

This section was derived from the Railroad Law of 1890, § 34, as amended by L. 1892, ch. 676. It was amended to read as above by L. 1915, ch. 564. The amendments are shown in the footnotes.

Unjust discrimination and unreasonable preference: see PUBLIC SERVICE COMMISSIONS LAW, §§ 31, 32.

Power of public service commissions to order changes in time schedules and running of additional cars and trains: see PUBLIC SERVICE COMMISSIONS LAW, § 51.

Exclusive privileges.— The provision against granting preference to competitors does not preclude a railroad owning a dock and terminal facilities from permitting one of two competing steamboat companies, under a contract, to use such docks to receive passengers and freight after the transportation on the railroad has ended. Alexandria Bay Steamboat Co. v. New York Cent., etc., R. Co., (1897) 18 App. Div. 527, 45 N. Y. S. 1091. Nor does the provision prohibit a railroad from entering into a contract granting the exclusive privilege to maintain a hackstand at a station, though it cannot prevent hackmen from delivering their passengers at the station and meeting passengers by previous appointment. New York Cent., etc., R. Co. v. Ryan, (1911) 71 Misc. 241, 129 N. Y. S. 55; New York Cent., etc., R. Co. v. Warren, (1900) 31 Misc. 571, 64 N. Y. S. 781; Brown v. New York Cent., etc., R. Co., (1894) 75 Hun 355, 27 N. Y. S. 69; New York Cent., etc., R. Co. v. Flynn, (1893) 74 Hun 124, 26 N. Y. S. 859.

Duty to furnish cars.— Under this section a railroad having tank cars unemployed is under a duty to furnish the same to an owner of crude oil desiring to ship the same and willing to pay the established rates. People v. New York, etc., R. Co., (1880) 22 Hun 533. Where a railroad fails to furnish cars to a shipper on his orders for same, and prefers other shippers, it is liable for the damages caused to him thereby. Dobbins v. Syracuse, etc., R. Co., (1913) 7 App. Div. 80, 141 N. Y. S. 637, affirmed (1915) 215 N. Y. 674, 109 N. E. 79.

Time and manner of running trains.— Subject to the limitations imposed by this section a railroad may, under section 8, regulate the time and manner of running its trains. People v. Brooklyn Heights R. Co., (1902) 69 App. Div. 549, 75 N. Y. S. 202, affirmed (1902) 172 N. Y. 90.

Excuses for nonperformance of duties.— The fact that freight handlers have entered upon a lawful strike does not excuse a railroad company from performing its duties to the public under this section. People v. New York Cent., etc., R. Co., (1883) 28 Hun 543.

[1] Following sentence added.

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Dissolution for nonperformance.—A violation of this section in failing to run trains at regular times, not amounting to an abandonment of its charter, furnishes no ground for the compulsory dissolution of a corporation. People v. Atlantic Ave. R. Co., (1891) 125 N. Y. 513, 26 N. E. 622, affirming 57 Hun 378, 10 N. Y. S. 907.

Mandamus to compel performance of duties.— The duty of a railroad to receive and transport property may be enforced by mandamus proceedings instituted by the state, through its attorney-general. People v. New York Cent., etc., R. Co., (1883) 28 Hun 543. It has been held, however, that mandamus will not issue on the relation of a prospective shipper to compel the railroad to furnish cars, his action for damages being an adequate remedy. People v. New York, etc., R. Co., (1880) 22 Hun 533.

Delay in transportation.— The provision requiring the railroad to furnish accommodations for property offered for transportation at the place of starting, within a reasonable time previous thereto, requires the railroad to forward the property with reasonable dispatch, and for unreasonable delay it is liable. Tierney v. New York Cent., etc., R. Co., (1879) 76 N. Y. 305; Wibert v. New York, etc., R. Co., (1855) 12 N. Y. 245; Bouker v. Long Island R. Co., (1895) 89 Hun 202, 35 N. Y. S. 23; Cartwright v. Rome, etc., R. Co., (1895) 85 Hun 517, 33 N. Y. S. 147.

Judicial supervision of schedules.— The court possesses no power under this section to determine in mandamus proceedings the frequency with which trains shall be run, that being a matter for the railroad to decide, subject to review by the Public Service Commission. People v. Brooklyn Heights R. Co., (1902) 172 N. Y. 90, 64 N. E. 788, affirming 69 App. Div. 549, 75 N. Y. S. 202.

Name of station.— This section does not provide for the name of a station partly in two villages, the stopping place for both, and the railroad company cannot be compelled to change the name, which is that of one of the villages and also of the town in which both villages are located. People v. New York, etc., R. Co., (1908) 125 App. Div. 641, 110 N. Y. S. 2.

Discontinuance of station.—A proceeding before the Public Service Commission for the discontinuance of a station is judicial in its nature and the determination of the commission is reviewable by certiorari. People v. Board of Com'rs, (1899) 158 N. Y. 421, 53 N. E. 163, affirming 32 App. Div. 158, 52 N. Y. S. 901. While a contract to maintain a station is admissible in a proceeding for the discontinuance of a station it is not binding on the commission, which may permit a discontinuance notwithstanding the contract. People v. Board of R. Com'rs, (1899) 158 N. Y. 421, 53 N. E. 163, affirming 32 App. Div. 158, 52 N. Y. S. 901.

Cited.— This section was cited in Dobbins v. Delaware, etc., R. Co., (1917) 176 App. Div. 132, 163 N. Y. S. 849 (per Woodward, J. dissenting).

§ 54-a. Full crews for certain trains. No person, corporation, trustee, receiver, or other court officer, shall run or operate, or cause to be run or operated, outside of the yard limits, on any railroad of more than fifty miles in length within this state, a freight train of more than twenty-five cars, unless said train shall be manned with a crew of not less than one engineer, one fireman, one conductor and three brakemen; nor any train other than a freight train of five cars or more, without a crew of not less than one engineer, one fireman, one conductor and two brakemen, and if the train is a baggage train or a passenger train having a baggage car or baggage compartment without a baggageman in addition to said crew; nor any freight train of twenty-five cars or less without a crew of not less than one engineer, one fireman, one conductor and two brakemen; nor any light engine without a car or cars, without a crew of not less than one engineer, one fireman and one conductor or brakeman. Each separate violation of

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the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. Each train or light engine run in violation of the provisions of this section shall be deemed to be a separate offense.

New. Added by L. 1913, ch. 146.

§ 55. Accommodation of connecting roads. Every railroad corporation whose road, at or near the same place, connects with or is intersected by two or more railroads competing for its business, shall fairly and impartially afford to each of such connecting or intersecting roads equal terms of accommodation, privileges and facilities in the transportation of cars, passengers, baggage and freight over and upon its roads and over and upon their roads, and equal facilities in the interchange and use of passenger, baggage, freight and other cars required to accommodate the business of each road, and in furnishing passenger tickets to passengers who may desire to make a continuous trip over any part of its roads and either of such connecting roads. The public service commission may, upon application of the corporation owning or operating either of the connecting or intersecting roads, and upon fourteen days' notice to the corporation owning or operating the other road, prescribe such regulations as will secure, in its judgment, the enjoyment of equal privileges, accommodations and facilities to such connecting or intersecting roads as may be required to accommodate the business of each road, and the terms and conditions upon which the same shall be afforded to each road. The decision of the commission shall be binding on the parties for two years, and the supreme court shall have power to compel the performance thereof by attachment, mandamus, or otherwise.

This section was derived from the Railroad Law of 1890, § 35.

Discrimination prohibited; connecting lines: see PUBLIC SERVICE COMMISSIONS LAW, § 35.

Continuous carriage: see PUBLIC SERVICE COMMISSIONS LAW, § 39.

Validity of statute requiring carrier to sell ticket for connecting line: see Ann. Cas. 1913E 613, note.

Requiring connection or joint use of properties of railroad companies as a taking for which compensation must be made: see 50 L. R. A. (N. S.) 652, note; L. R. A. 1916E 759, note.

State statute prescribing duty or liability of connecting carriers as regulation of interstate commerce: see 2 Ann. Cas. 517, note.

Liability of passenger carrier selling through ticket for wrongful acts or omissions of connecting carriers: see 3 Ann. Cas. 5, note; Ann. Cas. 1916A 493, note.

Connection of street railway and steam road.— This section applies to a connection between a steam railroad and an electric railway. Matter of Stillwater, etc., R. Co., (1902) 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489.

Cited.— This section was cited in Hudson Val. R. Co. v. Boston, etc., R. Co., (1904) 45 Misc. 520, 92 N. Y. S. 928, affirmed (1905) 106 App. Div. 375.

§ 56. Locomotives must stop at grade crossings. All trains and locomotives on railroads crossing each other at grade shall

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come to a full stop before crossing, not less than two hundred nor more than eight hundred feet from the crossing, and shall then cross only when the way is clear and upon a signal from a watchman stationed at the crossing. If the corporations can not agree as to the expense of the watchman, it shall be determined by the public service commission upon application thereto by either of them. If the corporations disagree as to the precedence of trains the public service commission may, after hearing, upon the application of either corporation, prescribe rules in relation thereto. The full stop and crossing on signal may be discontinued if the commission shall decide it to be impracticable, or if, with the approval of the commission, an interlocking switch and signal apparatus is adopted and put in operation at such a crossing. The full stop and crossing on signal shall not be required in depot yards, or the approaches thereto, if the crossing roads are under lease or subject to the same management or control in the use of tracks. An engineer, violating the foregoing provisions of this section, or any such rule of the commission, shall be liable to a penalty of one hundred dollars; and any corporation or person operating the railroad, violating any of such provisions or rules, shall be liable to a penalty of five hundred dollars. The commission may, whenever in its judgment the public safety requires the erection of interlocking switch and signal devices at points where steam and street surface railroads intersect at grade, direct the erection of such devices and apportion the expense of construction, operating and maintenance thereof between the companies affected thereby. No railroad corporation, nor any officer, agent or employee thereof, shall stop its cars, horses, or locomotives upon a grade crossing of a railroad of another corporation, for the purpose of receiving or delivering passengers or freight, or other purpose, and any person or corporation violating this provision, shall be liable to a penalty of two hundred and fifty dollars.

This section was derived from the Railroad Law of 1890, § 36, as amended by L. 1898, ch. 466, § 1.

Obstructing highways for more than five consecutive minutes: see PENAL LAW, § 1985.

Ringing bells and blowing whistles at crossings: see PENAL LAW, § 1985.

Obstructing passage of car: see PENAL LAW, § 1990.

Power of village trustees to enact ordinances to regulate time during which cars, engines or trains may stand on street crossings: see VILLAGE LAW, § 90, subd. 10.

Failure to stop as negligence.— In Lonergan v. Erie R. Co., (1901) 67 App. Div. 297, 73 N. Y. S. 392, the court said: "The essential object of the statute was to compel those in charge of trains making the crossing to devote more attention and give greater care to the performance of the act in safety; not to regulate the instant of doing it. If through failure to observe its provisions and stop an engineer concededly failed to see and came in collision with an approaching train which by stopping he would have seen and avoided, the accident would manifestly be a proximate and natural result of his disobedience. If on the other hand an engineer able without fully stopping to guard with his eyes an intersecting railroad and accomplish the purpose pointed out by the statute of seeing that the crossing was clear should

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be run down by another train upon that track which as a matter of fact he could not have seen if he had stopped and looked we do not think he should be barred from recovery as matter of law simply because as an accidental result of his stopping he might not have got on the crossing in time for a collision. The purpose of the statute is to make an engineer more careful and certain that the crossing is clear. Independent of that it is not designed to affect the time of his getting on the crossing. If his disobedience has defeated the substantial purpose of the statute and prevented him from seeing what he otherwise would have seen then it may well be said that he has contributed to the injury, otherwise we think not." In that case it appeared that the plaintiff's decedent, an engineer, did not stop on approaching a crossing but proceeded owing to the fact that the signal tower showed a clear track. The delay which would have attended stopping, though not the view, would have prevented a collision. The Appellate Division held that he was not guilty of contributory negligence, but reversed on other grounds. The Court of Appeals (173 N. Y. 616) in a memorandum decision held that contributory negligence was clearly made out.

Interlocking device in yard.— It seems that the use of interlocking switch and signal devices is impracticable where the point of crossing is a railroad yard, and it is doubtful whether one would be required to be installed in such a case. Cox v. Delaware, etc., R. Co., (1908) 128 App. Div. 363, 112 N. Y. S. 443.

Street railway carrying freight.— It has been said that this section indicates that the legislature contemplated that street surface railroads might carry freight. De Grauw v. Long Island Electric R. Co., (1889) 43 App. Div. 502, 60 N. Y. S. 163, affirmed (1900) 163 N. Y. 597 mem.

§ 57. Rates of fare. Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the following rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile:

1. Where the motive power is rope or cable, propelled by stationary power, five cents, with right to a minimum fare of ten cents; but if the railroad is less than two miles in length, and overcomes an elevation of five hundred feet or more to the mile, five cents for each one hundred feet of elevation so overcome, and the same rates of fare if the motive power is locomotives, furnished with cogs working into cogs on the railroad, and the length of road does not exceed four miles.

2. If a road not incorporated prior to May fifteenth, eighteen hundred and seventy-nine, and not located in the counties of New York and Kings, or within the limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents; and if over forty miles, three cents. Where by the laying down of a third rail upon a railroad of the ordinary gauge, a narrow-gauge track is created and used for the transportation of passengers, and the length of road does not exceed six miles, including any connecting road of the same gauge, such railroad, for the purpose of fare, shall be deemed a narrow-gauge road.

3. If its railroad overcomes an elevation of two hundred feet to the mile, for at least two consecutive miles, and does not exceed twenty miles in length, ten cents; if it overcomes an elevation

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or other evidence of such payment, which shall legibly state that it entitles the holder thereof to have such excess charge refunded, upon the delivery of the same at any ticket office of said company, upon the line of their railroad, and said company shall refund the same upon demand; and provided further that this section shall not apply to any passenger taking passage from a station or stopping place when tickets can not be purchased during half an hour previous to the schedule time for the departure of said train, on which such passenger takes passage.

This section was derived from L. 1889, ch. 38, § 1.

Right of carrier to refuse to accept non-ticket-holder as passenger: see 29 L. R. A. (N. S.) 299, note; L. R. A. 1916F 1094, note.

Rights of passenger who is unable to get ticket before train starts: see 24 L. R. A. (N. S.) 758, note.

Tender of a sum in excess of that due, with demand for change: see 13 L. R. A. (N. S.) 624, note.

What is reasonable sum which passenger may tender in payment of fare: see 10 Ann. Cas. 642, 18 Ann. Cas. 44, notes; 35 L. R. A. 489; 9 L. R. A. (N. S.) 579; 21 L. R. A. (N. S.) 868.

Character or condition of coin or currency that may be tendered in payment of fare: see 35 L. R. A. (N. S.) 1030, note.

Duty of carrier to receive worn or mutilated money in payment of fare: see Ann. Cas. 1912C 642, note.

Street railway.— This section does not apply to a street railway. Metzger v. New York State Rys., (1915) 168 App. Div. 187, 154 N. Y. S. 789.

Effect of creation of Greater New York.— The right which a railroad possessed, previous to the incorporation of the city of Greater New York to charge an excess fare between two points was not destroyed by the incorporation of such city, and the exception of passage wholly within an incorporated city does not apply in such a case. Hogan v. Long Island R. Co., (1912) 206 N. Y. 440, 100 N. E. 47, reversing 142 App. Div. 29, 126 N. Y. S. 449.

Cited.— This section was cited in Kent v. Jamestown St. R. Co, (1912) 205 N. Y. 361, 98 N. E. 664.

§ 59. Penalty for excessive fare. Any railroad corporation, which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars, to be recovered with the excess so received by the party paying the same; but no action can be maintained therefor, unless commenced within one year after the cause of action accrued.

This section was derived from the Railroad Law of 1890, § 39.

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I. In General

Proof of conductor's authority.—As a conductor is an agent to collect fares where he collects excessive fare the railroad is liable under this section, respondeat superior, without affirmative proof of his authority. Chase v. New York Cent. R. Co., (1863) 26 N. Y. 523; Porter v. New York Cent., etc., R. Co., (1861) 34 Barb. 353. In fact the act of a conductor, even though contrary to orders, in exacting an excessive fare subjects the railroad to liability. Porter v. New York Cent. R. Co., (1861) 34 Barb. 353.

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Extra cash fare on train.—Where a railroad has no right to charge an excess fare on a train under section 58, by reason of the journey being wholly within a city, it is liable under this section though it gave a redeemable receipt for the excess fare charged. Hogan v. Long Island R. Co., (1912) 206 N. Y. 440, 100 N. E. 47, reversing 142 App. Div. 29, 126 N. Y. S. 449. And where a railroad is entitled by law to charge an additional five cents where no ticket is procured, provided its station is open for the sale of tickets, and such a charge is made when the ticket office was closed this presents a case for a recovery under this section. Nellis v. New York Cent. R. Co., (1864) 30 N. Y. 505; Chase v. New York Cent. R. Co., (1863) 26 N. Y. 523; Porter v. New York Cent. R. Co., (1861) 34 Barb. 353. Where a railroad ticket office is not kept open up to the time in which a passenger could procure a ticket and board the train, the company in requiring an extra cash fare subjects itself to the penalty imposed by this section. Porter v. New York Cent. R. Co., (1861) 34 Barb. 353.

Requiring second fare.— Where a conductor demands a second fare under the mistaken belief that a passenger has not paid his fare, and insists on payment thereof this does not present a case authorizing a recovery under this section. Robinson v. International R. Co., (1907) 54 Misc. 163, 103 N. Y. S. 588. This section also does not apply where a passenger, because of his failure to get a ticket for which he has paid, is compelled to pay another fare by the conductor on a train. Wysocki v. Erie R. Co., (1913) 155 App. Div. 798, 140 N. Y. S. 950.

Charging fare without franchise.— Where a street railway has no right to run its cars over the line of another railway it cannot be considered as charging an excessive fare in charging for transportation over the same, on the theory that it had no right to charge any fare. Enton v. Nassau Electric R. Co., (1910) 68 Misc. 385, 124 N. Y. S. 555, affirmed 147 App. Div. 901, 131 N. Y. S. 1113.

Street railways.— This section applies to street railways. King v. Syracuse, etc., R. Co., (1911) 131 N. Y. S. 878.

Passenger riding for penalty.— It is immaterial that the party paying the excess was riding merely for the purpose of obtaining a penalty. Fisher v. New York Cent., etc., R. Co., (1871) 46 N. Y. 644.

Cumulative penalties.— The fifty dollars given by this section is to enable an aggrieved party to sue in a court of record for the wrong done by the overcharge, and but one penalty can be recovered for all acts committed before the commencement of the action; there can be no cumulation of penalties. Fisher v. New York Cent., etc., R. Co., (1871) 46 N. Y. 644.

Action by infant.— Where an infant is compelled to pay excessive fare he may sue for the statutory penalty by his guardian ad litem and the action need not be brought by his parent. Fox v. Interurban St. R. Co., (1904) 42 Misc. 538, 86 N. Y. S. 64.

Cited.— This section was cited in Osborne v. International R. Co., (1916) 98 Misc. 7, 161 N. Y. S. 1042, reversed (1917) 177 App. Div. 709; Johnston v. New York City R. Co., (1907) 55 Misc. 205, 105 N. Y. S. 1122 (per Seabury, J., dissenting).

II. Refusal of Transfer

In general.—The mere refusal of a transfer gives no right of action under this section, which applies only where excessive fare is taken. O'Connor v. Brooklyn Heights R. Co., (1908) 123 App. Div. 784, 108 N. Y. S. 471. Accordingly the refusal of a transfer in violation of the Milburn agreement in the city of Buffalo confers no rights under this section. Oatman v. International R. Co., (1917) 163 N. Y. S. 495. An action for a penalty for refusing a transfer, formerly given by section 104, was held not such an action as was contemplated by this section, hence the limitation of one year did not apply. Munro v. Brooklyn Heights R. Co., (1909) 195 N. Y. 254, 88 N. E. 567, affirming 120 App. Div. 516, 105 N. Y. S. 325. Nor did the exemption as to mistakes apply to such an action. Snee v. Brooklyn Heights R. Co., (1907) 120 App. Div. 570, 104 N. Y. S. 907, affirmed (1908) 193 N. Y. 659 mem. But see contra, Schwartzman v. Brooklyn Heights R. Co., (1906) 50 Misc. 116, 98 N. Y. S. 941.

Requiring extra fare.— It was assumed, but not decided in Bull v. New York City R. Co., (1908) 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. (N. S.)

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778, affirming 121 App. Div. 582, 106 N. Y. S. 378, that a passenger compelled to pay an extra fare by the refusal of a transfer might maintain an action under this section. This was also the opinion of Loughlin, J., concurring in Baron v. New York City R. Co., (1907) 120 App. Div. 134, 105 N. Y. S. 258. And in a later case it was held that a passenger refused a transfer in the city of Buffalo to which he is entitled under the so-called Milburn agreement, in consequence of which he is required to pay an extra fare, may recover under this section. Bingemann v. International R. Co., (1911) 73 Misc. 458, 131 N. Y. S. 4.

Refusal to honor transfer.— Where a railroad is under no duty to issue a transfer but it does so and a conductor refuses to honor the same and requires an additional fare to be paid, as it was entitled to the additional fare there can be no recovery under this section. King v. Nassau Electric R. Co., (1908) 128 App. Div. 130, 112 N. Y. S. 589.

Regulation as to transfers.— It seems that where a passenger boards a car bearing a sign which indicates that it will take him to his destination, which is not the fact according to another sign which he does not see, a regulation that transfers must be requested when fare is paid cannot be enforced against him and if he is forced to board another car to reach his destination and to pay another fare he may recover under this section. Goodman v. New York R. Co., (1913) 81 Misc. 207, 142 N. Y. S. 520.

III. Inadvertence or Mistake

Invalid transfer.— Where a passenger is required to pay an extra fare because of the mistake of a conductor in punching the wrong time on a transfer this presents a case of excusable mistake, in the absence of other proof of gross negligence. McCarthy v. International R. Co., (1908) 126 App. Div. 182, 110 N. Y. S. 936.

Ignorance of rights of transferred passenger.— Where a passenger has been compelled to get off one car and instructed to get on another to continue his journey, and the conductor on the second car insists on the payment of a second fare in ignorance of the passenger's rights, no recovery can be had as this is in effect charging a second fare in ignorance of the fact of previous payment. Stewart v. Metropolitan St. R. Co., (1897) 20 Misc. 605, 46 N. Y. S. 414.

Failure to give proper tickets.— Where a ticket agent by mistake and during rush hours gives out one ticket instead of two and thereby the passenger is required to pay an extra fare this presents a case of excusable neglect within this section. Wysocki v. Erie R. Co., (1913) 155 App. Div. 798, 140 N. Y. S. 950.

Change of fare.— Where no steps are taken to notify conductors of a change of fare further than to leave a small typewritten notice among other papers in the conductors' rooms, ignorance of the conductor as to the change is not excusable neglect under this section. King v. Syracuse, etc., R. Co., (1911) 131 N. Y. S. 878.

Grade overcome.—A mistake as to the right to charge a higher fare under section 57 by reason of the grade overcome may be excusable. Goodspeed v. Ithaca St. R. Co., (1903) 88 App. Div. 147, 84 N. Y. S. 383, affirmed (1906) 184 N. Y. 351.

Mistake of law.— In Parker v. Elmira, etc., R. Co., (1901) 165 N. Y. 274, 59 N. E. 81, while the point was not decided it was said that "it will not be easy" to maintain that a mistake of a railroad as to its legal rights relieves it from liability under this section. It was also said in Snee v. Brooklyn Heights R. Co., (1907) 120 App. Div. 570, 104 N. Y. S. 907, affirmed (1908) 193 N. Y. 659 mem., that the mistakes referred to were "mistakes of fact, such as of the distance between stations, or the like." And in one case a recovery has been allowed where "the evidence shows plan and intention . . . under legal advice." Petze v. Coney Island, etc., R. Co., (1908) 127 App. Div. 351, 111 N. Y. S. 532. The Court of Appeals, however, has held that "the legislature intended to exempt from the penalty any railroad corporation which in good faith and without wrongful intention had demanded and received a rate of fare in excess of that ordinarily to be charged and upon a mistaken construction of the statutory grant of right. The mistake which is to be relieved from must not have been the result of carelessness on

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the part of the corporation in being advised upon the subject of its legal rights. The circumstances should show that its action was induced in the particular case for such reasons as would govern the conduct of an ordinarily prudent person honestly desiring to act within his rights." Goodspeed v. Ithaca St. R. Co., (1906) 184 N. Y. 351, 77 N. E. 392, affirming 88 App. Div. 147, 84 N. Y. S. 383. Accordingly it has been held that where excess was demanded as a result of an honest mistake in the construction of the railroad's statutory rights there can be no recovery. Eaton v. Coney Island, etc., R. Co., (1910) 136 App. Div. 800, 121 N. Y. S. 793.

Tender back of extra fare.— Where a conductor has refused to accept a transfer and exacted an extra fare his act in subsequently, before the termination of the trip, offering to return the extra fare and accept the transfer warrants and requires the inference that there was an excusable mistake which precludes the recovery of a penalty. Tullis v. Brooklyn Heights R. Co., (1902) 71 App. Div. 494, 75 N. Y. S. 863.

IV. Pleading and Proof

Pleading consolidation proceedings.— In an action under this section it is enough to plead that the railroad was entitled to charge a certain rate of fare and the fact of overcharge, without setting out consolidation proceedings showing the basis of the rate of fare. Nellis v. New York Cent. R. Co., (1864) 30 N. Y. 505.

Quantum of proof.—All that is required in an action under this section is a preponderance of the evidence and the plaintiff need not prove his case beyond a reasonable doubt. Kerin v. New York City R. Co., (1907) 53 Misc. 568, 103 N. Y. S. 769.

§ 60. Issue and use of mileage books. Every railroad corporation operating a railroad in this state, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, and which does charge a maximum fare of more than two cents per mile, shall issue mileage books having either five hundred or one thousand coupons attached thereto, entitling the holder thereof, upon complying with the conditions hereof, to travel either five hundred or one thousand miles on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile. Such mileage books shall be kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city, and any of such books shall be issued immediately upon application therefor. Upon presentation of such mileage book to a conductor on any train, on any line of railroad owned or operated by said railroad corporation, the holder thereof, or any member of his family or firm, or any salesman of his firm, shall be entitled to travel for a number of miles equal to the number of coupons detached by such conductor. Such mileage book shall entitle the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used. Any railroad corporation which shall refuse to issue a mileage book, as provided by this section,

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or in violation hereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to whom such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrues.

This section was derived from L. 1895, ch. 1027, § 1, as amended by L. 1898, ch. 577, § 1.

Validity of regulations by public concerning the manner of using tickets or mileage books: see L. R. A. 1915E, 902 note.

Validity of statute requiring issuance of mileage books at reduced rates: see 7 L. R. A. (N. S.) 1086, note.

Reasonableness of condition attached to sale of mileage book: see Ann. Cas. 1914B 915, note.

Constitutionality.— This section is unconstitutional as applied to corporations organized before its enactment. Parish v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109; Beardsley v. New York, etc., R. Co., (1900) 162 N. Y. 230, 56 N. E. 488, reversing 15 App. Div. 251, 44 N. Y. S. 175. It is constitutional, however, as to corporations since organized. Parish v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109; Minor v. Erie R. Co., (1902) 171 N. Y. 566, 64 N. E. 454; Purdy v. Erie R. Co., (1900) 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, affirming 33 App. Div. 643, 54 N. Y. S. 1114; Horton v. Erie R. Co., (1903) 86 App. Div. 379, 83 N. Y. S. 733. And this is true though the new corporation is formed merely to take over existing properties. Minor v. Erie R. Co., (1902) 171 N. Y. 566, 64 N. E. 454. This section is also constitutional as applied to a corporation formed since its enactment by a consolidation of roads less than one hundred miles in length organized before its enactment. Parish v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109.

Interstate commerce.— This section applies to intrastate transportation by a railroad engaged in interstate commerce and as so construed is constitutional. Dillon v. Erie R. Co., (1897) 19 Misc. 116, 43 N. Y. S. 320. Under this section a passenger from a point without the state to a point within the state may pay his fare to the first station within this state and compel the railroad to accept the mileage for the trip within the state. Horton v. Erie R. Co., (1901) 65 App. Div. 587, 86 App. Div. 379, 83 N. Y. S. 733.

Restrictions as to users.—A railroad cannot restrict the use of a mileage book to the holder, and not his family, during the summer months and such a limitation therein is void and may be disregarded. Parish v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109. Employees and attendants of a state hospital are not entitled to ride on a mileage issued to the superintendent. Op. Atty.-Gen. (1896) 202.

Power of Public Service Commission.— While this section fixes the maximum rate for mileage books in the absence of an order of the Public Service Commission, that body has power, under sections 33 and 49 of the Public Service Commissions Law, to permit a higher rate than two cents per mile to be charged. People v. Public Service Commission, (1916) 171 App. Div. 607, 156 N. Y. S. 1065, affirmed on opinion below (1916) 218 N. Y. 643, 112 N. E. 1071, reversing Op. Atty.-Gen. (1915) 4 St. Dept. Rep. 210.

Cited.— This section was cited in People v. Public Service Commission, (1914) 159 App. Div. 531, 145 N. Y. S. 503, affirmed (1915) 215 N. Y. 689 mem.

§ 61. Passenger refusing to pay fare may be ejected. If any passenger shall refuse to pay his fare the conductor of the train, and the servants of the corporation, may put him and his baggage out of the cars, using no unnecessary force, on stopping the train,

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at any usual stopping place, or near any dwelling house, as the conductor may elect.

This section was derived from the Railroad Law of 1890, § 40.

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II. Grounds of ejection, 101
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IV. Time, place, and manner of ejection, 103

I. In General

Right of railroad to eject passenger for refusal to pay extra fare where no opportunity to buy ticket was presented: see 3 Ann. Cas. 887, note.

Right of railroad company to eject passenger for refusal to pay extra fare where sufficient opportunity to buy ticket was presented: see 10 Ann. Cas. 923, note; Ann. Cas. 1913A 1198, note.

Duty of carrier to give passenger time to produce ticket or pay fare: see 20 Ann. Cas. 922, note.

Implied authority of brakeman to eject trespassers from trains: see 2 Ann. Cas. 624, note; 18 Ann. Cas. 892, note.

Employees authorized to eject.— A brakeman is an employee having implied authority to eject for nonpayment of fare. Hoffman v. New York Cent., etc., R. Co., (1881) 87 N. Y. 25, 41 Am. Rep. 337.

Punitive damages.— Where a conductor in ejecting a passenger acts in good faith and uses no excessive force punitive damages are not recoverable. Townsend v. New York Cent., etc., R. Co., (1874) 56 N. Y. 295, 15 Am. Rep. 419; Hamilton v. Third Ave. R. Co., (1873) 53 N. Y. 25; Muckle v. Rochester R. Co., (1894) 79 Hun 32, 29 N. Y. S. 732. Compensatory damages may be recovered in such a case, however. Hamilton v. Third Ave. R. Co., (1873) 53 N. Y. 25.

Evidence of good faith.— Where punitive damages are claimed, and not otherwise, it is proper to permit the agent of the railroad who ejected a passenger to testify that he honestly believed that his fare had not been paid and that it was his duty to eject the passenger. Yates v. New York Cent., etc., R. Co., (1876) 67 N. Y. 100.

Abusive treatment.—Any abusive language or treatment of a railroad employee after ejecting a passenger is not chargeable to the railroad where it is not part of the res gestae. Hamilton v. New York Cent. R. Co., (1872) 51 N. Y. 100.

Cited.— This section was cited in Barker v. Coflin, (1860) 31 Barb. 556.

II. Grounds of Ejection

Ejection of passenger who has lost or mislaid his ticket: see L. R. A. 1916D 1184, note.

Ejection of custodian for nonpayment of child's fare: see 38 L. R. A. 140, note.

Boarding train at station not named on ticket.—Where a ticket provides for continuous passage between two points named the holder may lawfully use the same for passage between an intermediate point and the destination named, and an ejection based on the invalidity of the ticket is unlawful. Auerbach v. New York Cent., etc., R. Co., (1882) 89 N. Y. 281, 42 Am. Rep. 290, reversing 60 How. Pr. 382.

Refusal to exhibit ticket.—A regulation requiring passengers to exhibit their tickets whenever requested to do so has been held reasonable so as to authorize an ejection on a refusal to comply therewith, even though the conductor knew that the passenger had once exhibited his ticket. Hubbard v. New York, etc., R. Co., (1857) 15 N. Y. 455.

Refusal to surrender ticket.— Where a passenger refuses to surrender his ticket in exchange for a conductor's check showing that he has paid his fare, on the ground that he prefers the ticket as a receipt, he may be ejected. Northern R. Co. v. Page, (1856) 22 Barb. 130.

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Inability to find ticket.—Where a passenger on being asked for his fare endeavors to find his ticket, which he tells the conductor he has, and states that if he cannot find it he will pay a cash fare, he is entitled to a reasonable time to find his ticket and an immediate ejection is unlawful. Hayes v. New York, etc., R. Co., (1884) 20 Wkly. Dig. 237.

Mistake in punching transfers.— Where a passenger on a street railway is ejected because his transfer has, by mistake, been punched for the wrong time limit he may recover the damages caused thereby. Muckle v. Rochester R. Co., (1894) 79 Hun 32, 29 N. Y. S. 732.

Ticket having coupons removed.—Where a ticket has been rendered void for further passage by cutting coupons from it a conductor refusing to receive it and ejecting a passenger, as required by a reasonable rule of the railroad, is not personally liable though he believes the passenger's statement that he has paid full fare to his destination. Beebe v. Ayres, (1858) 28 Barb. 275.

Ticket surrendered on another train.— In Townsend v. New York Cent., etc., R. Co., (1874) 56 N. Y. 295, 15 Am. Rep. 419, Grover, J., gave it as his opinion that where a passenger who had surrendered a through ticket on a local train boarded another train without evidence of his right to continue his journey, a conductor on the latter train was justified in ejecting him and his only remedy was for breach of contract; that he could not recover for the ejection. A majority of the court, however, concurred in reversing the judgment on another ground, and on a subsequent appeal to the General Term it was held that a recovery might be had for compensatory damages, no discussion of Judge Grover's opinion being had, though the decision of the court as to the damages was followed.

Local ticket on through train.— Where a passenger boards a through train with a local ticket on a refusal to pay the additional fare to the next stop he may be at once ejected for nonpayment of fare. Fink v. Albany, etc., R. Co., (1871) 4 Lans. 147.

Expiration of time limit.— Viewing a ticket either as a contract or as a voucher, where a passenger knows, or from the length of time he has had it should know, that the time in which it shall be used is limited he cannot recover damages for ejection after the time limited has expired. Elmore v. Sands, (1874) 54 N. Y. 512, 13 Am. Rep. 617. Where, however, a passenger presents a ticket, which provides that it must be "used" before a certain time, within the time limited his ejection from the train thereafter, the time having expired in the meantime, is unlawful, as the ticket was "used" when presented. Auerbach v. New York Cent., etc., R. Co., (1882) 89 N. Y. 281, 42 Am. Rep. 290, reversing 60 How. Pr. 382. Even where a passenger has an excursion ticket requiring him absolutely to begin his journey at a certain point and on a named train, if he is directed to the wrong train at the initial point, and is then left at a station further on with directions to take the proper train, his ejection because of the fact that he did not board the train at the initial point is unlawful. Elliott v. New York Cent., etc., R. Co., (1889) 53 Hun 78, 6 N. Y. S. 363.

III. Tender of Fare

Sufficiency of tender of fare to prevent ejection: see 31 L. R. A. (N. S.) 992, note; L. R. A. 1915E 311, note.

Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion: see 43 L. R. A. 706, note; 34 L. R. A. (N. S.) 282, note.

Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion and lessen damages: see 43 L. R. A. 706, note; 34 L. R. A. (N. S.) 282, note.

Duty of passenger to pay fare second time to avoid ejection: see Ann. Cas. 1913B 1209, note.

Validity of regulation requiring passenger to pay fare in case of dispute: see 2 L. R. A. (N. S.) 695, note.

Duty of carrier to carry passenger who tenders fare after refusal to pay: see 10 Ann. Cas. 941, note; Ann. Cas. 1913C 1246, note.

Right of passenger to pay fare after train begins to stop for purpose of ejecting him: see 16 L. R. A. 53, note.

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Payment of back fare for distance already ridden as condition of being carried further: see 16 L. R. A. 55, note.

Tender after expulsion commenced.— "Where a passenger, by an illegal refusal to pay his fare has rendered it the duty of a conductor, in enforcing the reasonable rules and regulations of the company, to eject him from the cars, and the refusal and resistance of the passenger continues until after force has been required and applied, to enforce such rule, . . . he cannot make the continuance of the process of expulsion unlawful by an offer to pay fare during its progress." Pease v. Delaware, etc., R. Co., (1886) 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699, reversing 11 Daly 350.

Tender after train stopped.— Where a train is stopped for the purpose of ejecting a passenger he cannot by tendering his fare render his ejection wrongful. O'Brien v. New York Cent., etc., R. Co., (1880) 80 N. Y. 236; Nelson v. Long Island R. Co., (1876) 7 Hun 140; People v. Jillson, (1856) 3 Park. Crim. 234. Likewise where an ejection for refusal to exhibit a ticket is justified the passenger cannot render his ejection unlawful by exhibiting a ticket after the train has been stopped to eject him. Hibbard v. New York, etc., R. Co., (1857) 15 N. Y. 455.

Tender at station.— Even where an ejection takes place at a station if the departure of the train is delayed thereby the passenger has no right to reenter the train on payment of fare. Pease v. Delaware, etc., R. Co., (1886) 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699, reversing 11 Daly 350. Where, however, after a refusal to pay fare the train is stopped at a regular station to receive passengers and the fractious passenger offers to pay before his ejection has commenced, his ejection thereafter is wrongful. O'Brien v. New York Cent., etc., R. Co., (1880) 80 N. Y. 236. And where at a station and before a passenger has been ejected a third person offers the conductor his fare his subsequent ejection is unlawful. Guy v. New York, etc., R. Co., (1883) 30 Hun 399.

Tender for balance of journey.— Where a passenger has stopped over on a ticket entitling him to do so but not so punched as to indicate the facts, and on boarding another train is informed that the ticket is not good and that he must alight at the next station, which he does, purchasing a ticket there for his destination, he cannot thereafter be ejected from the same train for refusing to pay his fare to the place where he purchased his ticket. Ward v. New York Cent., etc., R. Co., (1890) 56 Hun 268, 9 N. Y. S. 377.

IV. Time, Place, and Manner of Ejection

Effort that must be made to collect fares before ejecting passengers for nonpayment: see L. R. A. 1915C 148, note.

Right to eject sick passenger for non-payment of fare: see Ann. Cas. 1915D 145, note.

Use of force not unlawful in certain cases: see Penal Law, § 246, subd. 5.

Liability of railroad companies for injuries inflicted in removing trespassers from trains: see 1 Ann. Cas. 775, note; 13 Ann. Cas. 591, note.

Aged person.— Where a passenger failing to pay his fare is so feeble as not to be able to care for himself or look out for his own safety the railroad should exercise reasonable care to see to it that he is not expelled or abandoned in such a place and under such circumstances that he will be exposed to unnecessary peril. Buckley v. Hudson Val. R. Co., (1914) 212 N. Y. 440, 106 N. E. 121, Ann. Cas. 1915D 143, L. R. A. 1915C 134. "While the right to eject a person refusing to pay fare is granted by this section of the Railroad Law, it could scarcely be asserted that expulsion of a helpless paralytic of advanced years from a train of cars in the night time even near a dwelling house, and especially at a point where more or less danger might be apprehended, would be justifiable under this provision of the statute. A sick or aged person, a cripple or a child is entitled to more attention at the hands of the servants of a railroad company than an adult in good health and under no disability. Buckley v. Hudson Val. R. Co., (1914) 212 N. Y. 440, 106 N. E. 121, Ann. Cas. 1915D 143, L. R. A. 1915C 134.

Intoxicated person.— Where a railroad wrongfully ejects a passenger, who is so intoxicated as to be unable to care for himself, and he wanders along

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the track to reach his destination and is killed, it is liable therefor. Guy v. New York, etc., R. Co., (1883) 30 Hun 399.

Ejection from moving train.— Even though a passenger has not paid his fare this gives the railroad no right to eject him while the car is in motion, under circumstances imperilling his life, and if its servant does so it is liable for the consequences. Sanford v. Eighth Ave. R. Co., (1861) 23 N. Y. 343, 80 Am. Dec. 286. A person cannot be thrown from a railroad train in rapid motion without the most imminent danger to life and although he may be justly liable to expulsion he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay fare will not justify a homicide so it fails to justify any act which in itself puts human life in peril and the passenger has the same right to repel an attempt to eject him when such an attempt will thus endanger him that he has to resist a direct attempt to take his life. The great law of self preservation so plainly establishes this conclusion that no further argument can be necessary." Sanford v. Eighth Ave. R. Co., (1861) 23 N. Y. 343, 80 Am. Dec. 286. A railroad is liable for the act of its employee in ejecting one who has not paid his fare while the train is in rapid motion, unless the act was done for an independent and wrongful purpose of his own. Hoffman v. New York Cent., etc., R. Co., (1881) 87 N. Y. 25, 41 Am. Rep. 337.

Proximity of dwelling house.— It cannot be said as a matter of law that a dwelling house twenty-five or thirty rods distant from the place of ejecting a passenger, and on another highway, is within the contemplation of the statute near a dwelling house, on a dark night, its vicinity being unknown to the passenger. Loomis v. Jewett, (1885) 35 Hun 313.

Duty to eject immediately.— Where a passenger is entitled to ride a certain distance, and no further, on a ticket which he presents, and he refuses to pay the additional fare necessary to take him to his destination and declares his intention to travel to his destination on his ticket, the conductor is under no duty to eject him immediately and may wait and eject him at the point to where his ticket entitled him to ride. Adwin v. New York Cent., etc., R. Co., (1871) 60 Barb. 590.

Resistance of ejection.— "When a conductor is in the wrong the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where circumstances may imperatively require that the passenger should remain on the train on account of others who may be there in his charge or where it is indispensable that he should hasten on his journey without delay; and if by reason of the mistaken judgment or willfulness of the conductor, he could be expelled when lawfully there, serious injury might follow. The law does not under such circumstances place the passenger within the power of the conductor; and when lawfully in the cars he is authorized to vindicate such right to the full extent which might be required for his protection." English v. Delaware, etc., Canal Co., (1876) 66 N. Y. 454, 23 Am. Rep. 69.

§ 62. Sleeping and parlor cars. Any railroad corporation may contract with any person, association or corporation for the hauling by the special or regular trains of said railroad corporation, the parlor, drawing-room or sleeping car or cars of such person, association or corporation, in which extra accommodations shall be furnished, for which said person, association or corporation furnishing such parlor, drawing-room or sleeping car or cars, may charge for the carriage and transportation of persons and property therein, a reasonable compensation for such extra accommodation, in addition to the fare and charges now allowed by law for the carriage and transportation of passengers and property in the ordinary cars of said railroad corporation. But said railroad corporation so contracting shall be liable in the same way and to the same extent as if the said car or cars were owned by it, and

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shall furnish sufficient ordinary cars for the reasonable accommodation of the traveling public.

This section was derived from the Railroad Law of 1890, § 41, as amended by L. 1892, ch. 676.

Liability for failure to furnish passenger with sleeping car accommodations: see L. R. A. 1915B 1202, note.

Duty of sleeping car company as to baggage or personal effects of passenger: see L. R. A. 1915B 621, note.

Contract exempting railroad company from liability for negligent injury to sleeping car employees or others sustaining a similar relation to the company: see 50 L. R. A. (N. S.) 432, note.

Liability of railroad, generally.— The fact that a passenger occupies a car of a sleeping car company in no way diminishes the liability of the railroad to him. Welch v. Pullman Palace Car Co., (1874) 16 Abb. Pr. N. S. 352. A railroad is liable for injuries received by a passenger by the fall of part of a berth on the passenger through its negligence. De Long v. Delaware, etc., R. Co., (1885) 37 Hun 282. Where the door of a sleeping car is left open and the toilet room is unlighted when a passenger finds it necessary to use the same this may constitute negligence as to a passenger injured by mistaking the outer door for the door of the lavatory, rendering the railroad liable. Piper v. New York Cent., etc., R. Co., (1894) 76 Hun 44, 27 N. Y. S. 593.

Acts of sleeping car employees.— So far as dealings with passengers are concerned sleeping car employees are the employees of the railroad, and the railroad is liable for their acts as such. Dwinelle v. New York Cent., etc., R. Co., (1890) 120 N. Y. 117, 24 N. E. 319, 17 A. S. R. 611, 8 L. R. A. 224; Thorpe v. New York Cent., etc., R. Co., (1879) 76 N. Y. 402, 32 Am. Rep. 325. Accordingly, where a porter assaults a passenger, while acting as its servant, the railroad is liable therefor though it did not employ him. Dwinelle v. New York Cent., etc., R. Co., (1890) 120 N. Y. 117, 24 N. E. 319, 17 A. S. R. 611, 8 L. R. A. 224; Thorpe v. New York Cent., etc., R. Co., (1879) 76 N. Y. 402, 32 Am. Rep. 325.

Theft of property.—A railroad operating sleeping cars is bound to have an employee carefully and continually on watch in the interior of the car, and for neglect resulting in the theft of a passenger's effects in his berth it is liable. Carpenter v. New York, etc., R. Co., (1891) 124 N. Y. 53, 26 N. E. 277, 21 A. S. R. 644, 11 L. R. A. 759; Sessions v. New York, etc., R. Co., (1894) 78 Hun 541, 29 N. Y. S. 628.

Person using free pass.— The purchase of a parlor car ticket does not alter or enlarge a passenger's status and where he is riding on a free pass containing exemption from liability his rights are not increased by the purchase of a parlor car ticket. Ulrich v. New York Cent., etc., R. Co., (1888) 108 N. Y. 80, 15 N. E. 60, 2 A. S. R. 369.

§ 63. Persons employed as drivers, conductors, motormen or gripmen. Any railroad corporation may employ any inhabitant of the state, of the age of twenty-one years, not addicted to the use of intoxicating liquors, as a car driver, conductor, motorman or gripman, or in any other capacity, if fit and competent therefor. All applicants for positions as motormen or gripmen on any street surface railroad in this state shall be subjected to a thorough examination by the officers of the corporation as to their habits, physical ability and intelligence. If this examination is satisfactory, the applicant shall be placed in the shop or power house where he can be made familiar with the power and machinery he is about to control. He shall then be placed on a car with an instructor, and when the latter is satisfied as to the applicant's capability for the position of motorman or gripman, he shall so

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certify to the officers of the company, and, if appointed, the applicant shall first serve on the lines of least travel. Any violation of the provisions of this section shall be a misdemeanor.

This section was derived from the Railroad Law of 1890, § 42, as amended by L. 1895, ch. 513, § 1.

Employment by common carrier of person addicted to intoxication: see PENAL LAW, § 1913.

Intoxication of railroad employees: see PENAL LAW, § 1984.

Liquor traffic on railroads: see LIQUOR TAX LAW, §§ 8, 21.

Employment of illiterate employees and telegraph operators: see PENAL LAW, § 1982.

Hours of labor on railroads: see LABOR LAW, §§ 6, 7, 8.

Effect on construction of section 64.— This section, which was formerly section 42, has been said to indicate that section 64, infra, formerly 42a, was intended to apply to electric street railways. Forton v. Crosstown St. R. Co., (1909) 63 Misc. 237, 116 N. Y. S. 746, reversed on other grounds (1910) 137 App. Div. 420; Riccio v. International R. Co., (1909) 63 Misc. 588, 117 N. Y. S. 720.

Right to employ nonresidents of state.— This section is purely permissive. It was not intended to prohibit employment of nonresidents of the state, but to prevent municipalities from prohibiting the employment of persons not residing therein. Op. Atty.-Gen. (1895) 415.

§ 64. Injuries to employees. In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation, or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are intrusted by such corporation or receiver, with the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice-principals of such corporation or receiver, and are not fellow-servants of such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, train, locomotive or attachment thereto belonging, owned or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such

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corporation or receiver, by reasonable and proper care, tests or inspection, such corporation or receiver shall be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action existing on May twenty-ninth, nineteen hundred and six; and no contract, receipt, rule or regulation, between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

This section was derived from the Railroad Law of 1890, § 42a, as added by L. 1906, ch. 657, § 1.

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I. In General

Employer's liability for injuries generally: see Labor Law, § 200 et seq.
Boarding cars in motion: see Penal Law, § 1990.
Obstructing railroad tracks: see Penal Law, § 1991.
Injuring railroad property and appurtenances: see Penal Law, § 1991.
Placing passenger cars in front of other cars: see Penal Law, § 1986.
Unlawful wearing of uniform or badge: see Penal Law, § 931.
Statutes affecting defense of contributory negligence in actions by servants against masters: see 5 Ann. Cas. 633, note.
Constitutionality of statute abrogating fellow-servant doctrine: see notes, 10 Ann. Cas. 1113; 19 Ann. Cas. 196; 126 L. R. A. (N. S.) 1040; 47 L. R. A. (N. S.) 84.
State statute modifying fellow-servant rule as an interference with interstate commerce: see 15 L. R. A. (N. S.) 134, note.
What is a railroad hazard within statutes abolishing or restricting fellow-servant rule as to railroad employees: see 18 L. R. A. (N. S.) 478, note; 22 L. R. A. (N. S.) 969, note.
What constitutes operation of railroad under statutes abrogating fellow-servant rule for railroads: see 1 L. R. A. (N. S.) 696, note.
Is the work of a section gang "connected with the use and operation" of the railroad, within the meaning of fellow-servant statute: see 6 L. R. A. (N. S.) 452, note.
Applicability to private railroad of enactment abrogating fellow-servant rule for railroads: see 1 L. R. A. (N. S.) 479, note.
Abrogation of defense of fellow-servant doctrine by Federal employers' liability act: see 47 L. R. A. (N. S.) 60, note; L. R. A. 1915C 65, note.

Constitutionality.—This section is constitutional. Inglese v. New York, etc., R. Co., (1909) 133 App. Div. 198, 117 N. Y. S. 392; Schradin v. New York Cent., etc., R. Co., (1908) 124 App. Div. 705, 109 N. Y. S. 428, affirmed (1909) 194 N. Y. 534, 565, 87 N. E. 1126, 88 N. E. 1131. And this is true even as applied to street railways. Simons v. Brooklyn Heights R. Co., (1910) 142 App. Div. 36, 126 N. Y. S. 792.

Application to street railways.— This section applies to street railways. Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664; Simons v. Brooklyn Heights R. Co., (1910) 142 App. Div. 36, 126 N. Y. S. 792; Forton v. Crosstown St. R. Co., (1909) 63 Misc. 237, 116 N. Y. S. 746, reversed

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on other grounds 137 App. Div. 420, 121 N. Y. S. 749; Riccio v. International R. Co., (1909) 63 Misc. 588, 117 N. Y. S. 720.

Railroad of business corporation.— This section does not apply to a railroad operated by a business corporation which is not a railroad corporation. Matrusciello v. Milliken, (1910) 141 App. Div. 769, 126 N. Y. S. 739, affirmed (1913) 207 N. Y. 699 mem.

Employees engaged in interstate commerce.— This section has no application to an employee engaged in interstate commerce at the time of an accident, as the Federal Employers' Liability Act governs such a case. Burnett v. Erie R. Co., (1913) 159 App. Div. 712, 144 N. Y. S. 969.

Employees on construction work.— Where a railroad furnishes a locomotive and train crew to haul materials for a contractor on construction work, the tracks being those of the railroad and the employees being ignorant of a provision in the construction contract that they shall be the contractor's employees, the train crew may be deemed railroad employees and as such entitled to the benefits of this section. Jones v. New York Cent., etc., R. Co., (1909) 134 App. Div. 39, 117 N. Y. S. 1113, reversing 61 Misc. 139, 114 N. Y. S. 756.

Officer of freight classification association.—An officer of the Freight or Official Classification Association in riding on a railroad is not an employee within this section which is intended to protect employees actually engaged in the business of operating a railroad. Gill v. Erie R. Co., (1912) 151 App. Div. 131, 135 N. Y. S. 355.

Service of notice.—The service of a notice, as under the Employers' Liability Act, is not a condition precedent to receiving the benefits of the section. Inglese v. New York, etc., R. Co., (1909) 133 App. Div. 198, 117 N. Y. S. 392; Schradin v. New York Cent., etc., R. Co., (1908) 124 App. Div. 705, 109 N. Y. S. 428, affirmed (1909) 194 N. Y. 534, 565, 87 N. E. 1126, 88 N. E. 1131.

Free pass.—An employee going to his work on a passenger train on a free pass given him as part of his contract of employment is an employee entitled to the benefits of this section. Vroom v. New York Cent., etc., R. Co., (1909) 129 App. Div. 858, 115 N. Y. S. 1063, affirmed (1910) 197 N. Y. 588, 91 N. E. 1121.

Relief association.—A voluntary relief association of railroad employees, to whose funds the railroad contributes, under whose rules the acceptance of benefits for injuries bars any action against the railroad, is not in violation of the last clause of this section, as a person injured may elect whether he will take relief from the fund, after an injury, or will prosecute his action, and the rules do not limit his right of action. Colarzzi v. Pennsylvania R. Co., (1913) 208 N. Y. 275, 101 N. E. 859, affirming 143 App. Div. 638, 128 N. Y. S. 312.

Pleading.— It is not necessary to plead this section in order to rely on it. Inglese v. New York, etc., R. Co., (1909) 133 App. Div. 198, 117 N. Y. S. 392; Schradin v. New York Cent., etc., R. Co., (1908) 124 App. Div. 705, 109 N. Y. S. 428, affirmed (1909) 194 N. Y. 534, 565, 87 N. E. 1126, 88 N. E. 1131. But the plaintiff must plead a cause of action, and must allege facts which show that the section is applicable. Murtaugh v. Joline, (1911) 70 Misc. 251, 126 N. Y. S. 672.

Cited.— This section was cited in O'Brien v. Erie R. Co., (1913) 210 N. Y. 96, 103 N. E. 895, reversing 148 App. Div. 931, 133 N. Y. S. 1134, 139 App. Div. 291, 123 N. Y. S. 1040; Hickey v. New York Cent., etc., R. Co., (1914) 163 App. Div. 270, 148 N. Y. S. 795; Lipstein v. Provident Loan Soc., (1913) 154 App. Div. 732, 139 N. Y. S. 799; Cashmore v. Peerless Motor Car Co., (1913) 154 App. Div. 814, 139 N. Y. S. 359; Smith v. American Ice Co., (1912) 152 App. Div. 483, 137 N. Y. S. 290; Hintze v. New York Cent., etc., R. Co., (1912) 149 App. Div. 217, 133 N. Y. S. 687; McCue v. Brooklyn Heights R. Co., (1912) 149 App. Div. 919, 133 N. Y. S. 659 (per Burr, J., dissenting), affirmed (1914) 210 N. Y. 583 mem.; Baccelli v. Delaware, etc., Co., (1910) 138 App. Div. 623, 122 N. Y. S. 849; Kozak v. Erie R. Co., (1909) 135 App. Div. 726, 119 N. Y. S. 876, affirmed (1911) 202 N. Y. 534, 95 N. Y. 1132; Pensabene v. F. & J. Auditore Co., (1912) 78 Misc. 538, 138 N. Y. S. 947, reversed (1913) 155 App. Div. 368.

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II. Defective Appliances

In general.— The presumtion arising from a defect arises only as to a defect which could have been discovered by reasonable tests and inspection, and not as to one not so discoverable. Larson v. Nassau Electric R. Co., (1915) 165 App. Div. 887, 151 N. Y. S. 694. "Proof of the defect is not conclusive evidence against the corporation but the presumption should be taken with all the other proof in the action, and when upon all of the evidence it appears that the defect could have been discovered by the corporation, by reasonable and proper care or inspection, the corporation is liable for damages by reason of the injury." Kent v. Erie R. Co., (1916) 217 N. Y. 349, 111 N. E. 1071.

Defective handhold.— A defective handhold on a car is a defect within this section. Kent v. Erie R. Co., (1916) 217 N. Y. 349, 111 N. E. 1071.

Open switch.— Where a switch has not been properly closed and locked the defect caused thereby is one for which the railroad is liable under this section. Van Inwegen v. Erie R. Co., (1908) 126 App. Div. 297, 110 N. Y. S. 959, affirmed (1909) 194 N. Y. 534, 87 N. E. 1128.

Defective air pump.— A defect in a street car automatic air pump, causing the air slowly to leak out so that it pumped more frequently, has been held not a defect discoverable by reasonable tests within this section. Larson v. Nassau Electric R. Co., (1915) 165 App. Div. 887, 151 N. Y. S. 694.

Electric shock.— Where a servant is injured by a shock of electricity while operating an electric switch signal at a switch on a single track street railway, this presents a case of a defect within this section. Costigan v. New York, etc., R. Co., (1914) 160 App. Div. 597, 145 N. Y. S. 1029.

III. Vice Principals

In general.— This section, so far as vice principals are concerned, applies "to such employees of the road whose special or sole functions are to give warning, and not to those upon whom such duty devolves only as an incident to their work." Hintze v. New York Cent., etc., R. Co., (1910) 140 App. Div. 852, 125 N. Y. S. 644. "It is only when the negligence complained of is due to the superintendent in directing the performance of duties that the rule is changed, and not where the parties are in a position to act independently." So that where a superintendent and workmen have finished their duties and are waiting for a train, any negligence of the superintendent in his individual capacity is not chargeable to the railroad. Cavanagh v. Central New England R. Co., (1909) 131 App. Div. 856, 116 N. Y. S. 343. Where it is certain that the negligence of one of three vice principals caused an injury it is not necessary that it be proved which one was negligent. Douglass v. New York Cent., etc., R. Co., (1913) 158 App. Div. 196, 143 N. Y. S. 115, affirmed (1914) 213 N. Y. 663 mem.

Signalman and conductor.— A signalman on a railroad is a vice principal of a conductor. Douglass v. New York Cent., etc. R. Co., (1913) 158 App. Div. 196, 143 N. Y. S. 115, affirmed (1914) 213 N. Y. 663 mem.

Motorman and conductor.— So far as starting a street car is concerned the conductor in giving the signal to start is the vice principal of the motorman, and the motorman in physically starting the car is the vice principal of the conductor and if he negligently starts the same, injuring the conductor, the company is liable. Simons v. Brooklyn Heights R. Co., (1910) 142 App. Div. 36, 126 N. Y. S. 792, quoted in Larson v. Nassau Electric R. Co., (1915) 165 App. Div. 887, 151 N. Y. S. 694; Phillips v. Crosstown St. R. Co., (1913) 157 App. Div. 876, 143 N. Y. 183 (per Kruse, J., dissenting). A motorman on one car is the vice principal of a motorman of another car, under this section, as he has physical control of the car. Gorman v. Brooklyn, etc., R. Co., (1911) 147 App. Div. 21, 131 N. Y. S. 686; Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664. A conductor of a street car in taking down and reversing the trolley pole so that the car may proceed on its return trip is not acting as a vice principal of the motorman. Larson v. Nassau Electric R. Co., (1915) 165 App. Div. 887, 151 N. Y. S. 694.

Negligence of motorman.— Even though a motorman is a vice principal this does not render the railway liable for his running into an open switch negligently left open by one not a vice principal. Connors v. International R. Co., (1917) 176 App. Div. 941, 162 N. Y. S. 1085.

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Workman employed as watchman.— One employed to watch for approaching trains to warn workmen is a vice principal under this section. Schradin v. New York Cent., etc., R. Co., (1908) 124 App. Div. 705, 109 N. Y. S. 428, affirmed (1909) 194 N. Y. 534, 565, 87 N. E. 1126, 88 N. E. 1131. Accordingly a foreman of a section gang whose duty it is to give warning of the approach of trains is a vice principal under this section. Inglese v. New York, etc., R. Co., (1909) 133 App. Div. 198, 117 N. Y. S. 392; Laplaca v. Lake Shore, etc., R. Co., (1908) 127 App. Div. 843, 111 N. Y. S. 797, affirmed (1909) 194 N. Y. 562, 87 N. E. 1121. Where, however, section men work in pairs, one working and the other watching for approaching trains, the employees alternating in the performance of their duties, the one who is watching is not the vice principal of the other. Hintze v. New York Cent., etc., R. Co., (1910) 140 App. Div. 852, 125 N. Y. S. 644.

Conductor as vice principal of brakeman.— The negligence of a conductor in independently giving a signal to the engineer which had not been communicated to him by a brakeman engaged in uncoupling cars, as required by the rules, is an act of superintendence for which the railroad is liable. Brown v. New York Cent., etc., R. Co., (1908) 126 App. Div. 240, 110 N. Y. S. 514, affirmed (1909) 196 N. Y. 542, 89 N. E. 1096.

Employee signalling engineer.— A brakeman or other employee who signals an engineer does not direct or control him within this section, and is not a vice principal. Eagen v. Buffalo Union Terminal R. Co., (1911) 200 N. Y. 478, 93 N. E. 1110; Hallock v. New York, etc., R. Co., (1910) 197 N. Y. 450, 90 N. E. 1124, 52 L. R. A. (N. S.) 1142; Keane v. Sea Beach R. Co., (1914) 161 App. Div. 73, 146 N. Y. S. 205; Kinney v. New York Cent., etc., R. Co., (1916) 217 N. Y. 325, 111 N. E. 1048, reversing 157 App. Div. 942, 142 N. Y. S. 1126.

Engineer as vice principal.—An engineer is a vice principal of a section hand under this section, Sereno v. Delaware, etc., R. Co., (1911) 145 App. Div. 136, 129 N. Y. S. 159; Traynor v. New York Cent., etc., R. Co., (1913) 155 App. Div. 600, 140 N. Y. S. 625; or of a flagman at a crossing, Connell v. New York Cent., etc., R. Co., (1911) 144 App. Div. 664, 129 N. Y. S. 666; or of the fireman, Matter of Taylor, (1911 144 App. Div. 634, 129 N. Y. S. 378. See also as to engineer's being vice principal, Bragg v. Central New England R. Co., (1914) 160 App. Div. 603, 145 N. Y. S. 1049. Under this section an engineer in negligently stopping a train suddenly acts as a vice principal as to a brakeman. Curran v. Lake Champlain, etc., R. Co., (1914) 211 N. Y. 60, 105 N. E. 105. An engineer in negligently starting a train is also the vice principal of a brakeman who gave the signal to start. Breed v. Lehigh Val. R. Co., (1909) 131 App. Div. 492, 115 N. Y. S. 1019. The engineer of a train in operating the same also is a vice principal of the conductor. Payne v. Lehigh Val. R. Co., (1913) 158 App. Div. 105, 143 N. Y. S. 319, affirmed (1915) 213 N. Y. 687 mem. The engineer of a train has also been deemed the vice principal of a head brakeman in negligently giving him an order or direction. Reynolds v. Lehigh Val. R. Co., (1911) 148 App. Div. 345, 132 N. Y. S. 885, affirmed (1914) 210 N. Y. 569 mem. Under this section an engineer on an engine running without cars or a conductor is a vice principal of a fireman and for his negligence in performing his duties in operating the engine the railroad is responsible. Hart v. New York Cent., etc., R. Co., (1912) 205 N. Y. 317, 98 N. E. 493. While both an engineer and conductor are vice principals yet where a conductor is injured by an act of negligence of an engineer, not affected by any control exercised by the conductor, a recovery under this section is authorized. Hildebrant v. Lehigh Val. R. Co., (1913) 157 App. Div. 828, 143 N. Y. S. 247, affirmed (1915) 213 N. Y. 682 mem.

Negligence of engineer.— But where it is not shown that an engineer knew, or in the course of his duties should have known of the dangerous manner in which coal was placed on the tender the railroad is not liable, under this section, for injuries caused by falling coal on the theory that he was a vice principal. Utess v. Erie R. Co., (1912) 204 N. Y. 324, 97 N. E. 722, Ann. Cas. 1913D 46, reversing 138 App. Div. 914, 123 N. Y. S. 1146, 131 App. Div. 447, 115 N. Y. S. 389.

Fireman operating engine and brakeman.— A fireman operating an engine is a vice principal as to a brakeman injured by its negligent operation under this section. O'Neil v. Lehigh Val. R. Co., (1916) 172 App. Div. 28, 158 N. Y. S. 530.

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§ 65. Conductors and employees must wear badges. Every conductor and employee of a railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office or employment, and the initial letters of the corporation employing him. No conductor or collector without such badge shall demand or receive from any passenger any fare or ticket or exercise any of the powers of his employment. No officer or employee without such badge shall meddle or interfere with any passenger, his baggage or property.

This section was derived from the Railroad Law of 1890, § 43, as amended by L. 1892, ch. 676.

Inciting railroad employees not to wear uniform and unauthorized wearing of uniform: see PENAL LAW, § 1989.

Cited.— This section was cited in Thorpe v. New York Cent., etc., R. Co., (1879) 76 N. Y. 402, 32 Am. Rep. 325.

§ 66. Checks for baggage. A check, made of some proper substance of convenient size and form, plainly stamped with numbers, and furnished with a convenient strap or other appendage for attaching to baggage, shall be affixed to every piece or parcel of baggage when taken for transportation for a passenger by the agent or employee of such corporation, if there is a handle, loop or fixture therefor upon the piece or parcel of baggage, and a duplicate thereof given to the passenger or person delivering the same to him. If such check be refused on demand the corporation shall pay to the passenger the sum of ten dollars, and no fare shall be collected or received from him; and if he shall have paid his fare it shall be refunded to him by the conductor in charge of the train. Such baggage shall be delivered, without unnecessary delay, to the passenger or any person acting in his behalf, at the place to which it was to be transported, where the cars usually stop, or at any other regular intermediate stopping place upon notice to the baggage-master in charge of baggage on the train of not less than thirty minutes, upon presentation of such duplicate check to the officer or agent of the railroad corporation, or of any corporation, over any portion of whose road it was transported. Bicycles are hereby declared to be and be deemed baggage for the purposes of this article and shall be transported as baggage for passengers by railroad corporations and subject to the same liabilities, and no such passenger shall be required to crate, cover or otherwise protect any such bicycle; provided, however, that a railroad corporation shall not be required to transport, under the provisions of this section, more than one bicycle for a single person.

This section was derived from the Railroad Law of 1890, § 44, as amended by L. 1892, ch. 676; L. 1896, ch. 333; L. 1902, ch. 388.

Checking beyond own line.— No obligation rests on a railroad, under this section, to check baggage to a point beyond its own line. Isaacson v. New York Cent., etc., R. Co., (1884) 94 N. Y. 278, 46 Am. Rep. 142.

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Check as evidence of delivery.— It seems that the possession of a baggage check prima facie establishes the fact that baggage was delivered and the holder was a passenger. Davis v. Cayuga, etc., R. Co., (1854) 10 How. Pr. 330.

Lost at destination.— Where a passenger on arrival at his destination immediately endeavors to obtain baggage which he has checked and continues his endeavors, but is unable to procure it because of the absence of the baggagemaster, the railroad is liable for its subsequent loss by burglary. Dininny v. New York, etc., R. Co., (1872) 49 N. Y. 546.

§ 67. Penalties for injuries to baggage. Any person whose duty it is for or on behalf of the common carrier to handle, remove, or care for the baggage of passengers, who shall recklessly or wilfully injure or destroy any trunk, valise, box, bag, package or parcel, while loading, unloading, transporting, delivering or storing the same, or any railroad corporation, which shall knowingly keep in its employment any such wilful or reckless person, or which shall permit any injury or destruction of such property, through failure to provide sufficient help and facilities for the handling thereof, shall pay to the party injured thereby the sum of fifty dollars, in addition to such damages.

This section was derived from the Railroad Law of 1890, § 45.

Liability for damage to property in transit: see PUBLIC SERVICE COMMISSIONS LAW, § 38.

Refusal to surrender ticket or pay fare because of breach of contract as affecting right to recover for damage to or loss of baggage: see L. R. A. 1916E 491, note.

§ 68. Unclaimed freight and baggage. Every railroad or other transportation corporation, doing business in this state, which shall have unclaimed freight or baggage, not live stock or perishable, in its possession for the period of sixty days, may deliver the same to any warehouse company, or person or persons engaged in the warehouse business, within this state, and take a warehouse receipt for the storage thereof. Upon such delivery and upon taking such warehouse receipt, every such railroad or other transportation corporation shall be discharged of all liability in respect to any such unclaimed freight or baggage from and after such delivery. At any time within two years after such delivery, such railroad or other transportation corporation shall surrender and transfer such warehouse receipt to the owner of any such unclaimed freight or baggage upon demand, and upon payment of all charges and expenses for transportation and storage then due, if any, to any such railroad or other transportation corporation. In case any such railroad or other transportation company shall have had unclaimed freight or baggage, not live stock or perishable, in its possession for a period of one year and shall not have delivered the same to a warehouse company or person or persons engaged in the warehouse business as above provided, then such railroad or other transportation company may proceed to sell the same at

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public auction, and out of the proceeds may retain the charges of transportation, handling and storage of such unclaimed freight or baggage, and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale, to be published weekly in a newspaper published in or nearest the town or city to which such unclaimed freight or baggage was consigned, or at which it was directed to be left, and also at the town or city where such sale is to take place; and said notice shall contain a general description of such unclaimed freight or baggage, the name of the shipper thereof, if known, and a statement of the consignment thereof, whether to a designated consignee or to order, if known, or the place at which the same was to be left, as near as may be; and the expenses incurred for advertising shall be a lien upon such unclaimed freight or baggage in a ratable proportion, according to the value of each article, package or parcel, if more than one. Such railroad or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of the unclaimed freight or baggage consigned to the same consignee or covered by each consignment, as near as can be ascertained, and at any time within five years thereafter, shall refund any surplus so retained to the owner of such unclaimed freight or baggage, his personal representatives or assigns, on satisfactory proof of such ownership. In case such balance shall not be claimed by the rightful owner within five years after the sale as above specified, then it shall be paid to the county treasurer, for the use of the county poor of the county where the sale is made.

Unclaimed live stock and perishable freight or baggage may be sold by any such railroad or other transportation corporation without notice, as soon as it can be, upon the best terms that can be obtained. All moneys arising from the sale of any such unclaimed live stock, perishable freight or baggage, after deducting therefrom all charges and expenses for transportation, storage, keeping, commissions for selling the property, and any amount previously paid for its loss or non-delivery, shall be deposited by the corporation making such sale with a report thereof, and proof that the property was live stock or perishable freight, with the comptroller for the benefit of the general fund of the state, and shall be held by him in trust for reclamation by the person or persons entitled to receive the same.

This section was derived from the Railroad Law of 1890, § 46, as amended by L. 1892, ch. 676; L. 1896, ch. 974; L. 1899, ch. 582.

Duty of carrier as to unclaimed freight and baggage: see GENERAL BUSINESS LAW, § 280 et seq.

Warehousemen generally: see GENERAL BUSINESS LAW, § 90 et seq.

What is reasonable time for passenger to call for baggage after arrival so as to terminate liability of carrier as such: see 16 Ann. Cas. 712, note; Ann. Cas. 1915B 634, note.

Liability for freight refused.— Where a railroad has tendered freight to the

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consignee, who refuses to accept the same, its subsequent liability is that of a warehouseman. And where, on freight being refused by the consignee, the railroad delivers the property to a responsible warehouseman for storage on account of the consignor, and the shipper receives notice of the rejection, its liability ceases. Manhattan Rubber Shoe Co. v. Chicago, etc., R. Co., (1896) 9 App. Div. 172, 41 N. Y. S. 83.

Liability as to baggage.— By virtue of this section a railroad, in receiving baggage, agrees to exercise the care required of carriers with reference to baggage until a reasonable time has elapsed for the passenger to procure it at his destination, and if not so called for that it shall be properly stored and reasonable care exercised to prevent injury or loss until it is called for or lawfully disposed of. Burnell v. New York Cent. R. Co., (1871) 45 N. Y. 184, 6 Am. Rep. 61.

Cited.— This section was cited in Brooklyn Eastern Dist. Terminal v. Central R. Co., (1917) 176 App. Div. 352, 162 N. Y. S. 911.

§ 69. Tickets and checks for connecting steamboats. The proprietors of any line of steamboats, terminating or stopping for passengers at any place where a railroad corporation has a depot or station, may furnish tickets and baggage-checks to such corporation for the use of passengers, traveling over its road, who desire to connect with such line of boats at any such place, and the railroad corporation shall sell such tickets and deliver a duplicate of one of such checks to any such passenger applying therefor, and shall account for and pay over to the proprietor of such line of boats all moneys received by it for the sale of such tickets; and any such railroad corporation may furnish tickets and checks for baggage to the proprietors of any such line of steamboats for the use of passengers traveling over any part of such line of boats, who desire to connect with the railroad of any such corporation at any such place, and such proprietors shall sell such tickets and deliver a duplicate of one of such checks to any such passenger applying therefor, and shall account for and pay over to such corporation all moneys received by them for the sale of such tickets. No greater rate of fare shall be charged by any railroad corporation to any such passenger for the distance traveled over its road than is charged to travelers for the same distance whose trip ends at the place where connection is made with any such line of boats, and no greater rate of fare shall be charged by the proprietors of any such steamboat line to any such passenger for the distance traveled over its line, than is charged to travelers for the same distance whose trip ends at the place where connection is made with any such railroad. Any additional cost of transfer of a passenger or his baggage from railroad depot or station to steamboat landing, or from steamboat landing to depot or station, shall be borne by the passenger or the proprietors of the steamboat line or the railroad corporation at whose instance or for whose benefit such transfer is made. Every railroad corporation and the proprietors of any line of steamboats, their agents or servants, who shall neglect or refuse to sell tickets or furnish a check to any passenger applying for the same, when the same shall have been furnished to them, shall pay to such passenger the sum

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of ten dollars, and no fare or toll shall be collected from him for riding over such road or upon such boats, as the case may be; and in addition thereto any railroad corporation so neglecting or refusing, shall pay the proprietors of such line of boats two hundred and fifty dollars for each day it shall so neglect or refuse; and the proprietors of any such line of boats so neglecting or refusing shall pay to such railroad corporation a like sum for each day they shall so neglect or refuse.

Every such railroad corporation shall also receive any freight which shall be delivered at any station on the line of its road, marked to go by way of boat or any particular line of boats from any station on its road at which such boat or line of boats terminates or stops for freight, and shall transport such freight with all convenient speed to such station, and on its arrival there cause the proprietors of the steamboat line by which it is directed to be sent, or their agent, to be notified of such arrival, and shall deliver such freight to such proprietors or their agent with the bill of charges thereon due such railroad corporation, for the payment of which charges the proprietor or proprietors of such steamboat line shall be responsible, and shall account for and pay the same to such railroad corporation on demand. The railroad corporation shall not charge for the transportation of such freight over its road any greater sum pro rata than it charges for carrying the same kind of freight the same distance over its road, if it was to be transported by such corporation by rail to its final destination; or to the terminus of the road of such corporation in case it terminates before such final destination is reached. Any freight delivered by the proprietors of any steamboat or steamboat line, or their authorized agent, at any station, at a place where such steamboat or steamboats have a landing, to any such railroad corporation, for transportation over its road or any part thereof, shall be transported by such corporation to its place of destination for the same price pro rata which would be charged for the same kind of freight the same distance over its road, if the same had been taken on at the point of first shipment by boat, or at the terminus of the road of such corporation, in case it does not extend to the point of first shipment.

This section was derived from the Railroad Law of 1890, § 47.

Discrimination prohibited; connecting lines: see PUBLIC SERVICE COMMISSIONS LAW, § 35.

Long and short haul: see PUBLIC SERVICE COMMISSIONS LAW, § 36.

Apportionment of traffic.— This section does not impose on a railroad the duty of apportioning freight and passengers between rival steamboat companies which connect with its road, and it may rightfully enter into a traffic arrangement with one company to route freight and passengers over its line where the steamboat company is not designated by the passenger or shipper, provided it does not refuse to sell tickets or issue bills of lading, furnished to it by a steamboat company, to anyone requesting the same. Alexandria Bay Steamboat Co. v. New York Cent., etc., R. Co., (1897) 18 App. Div. 527, 45 N. Y. S. 1091.

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§ 70. Rights and liabilities as common carriers. Every railroad corporation doing business in this state shall be a common carrier. Any one of two or more corporations owning or operating connecting roads, within this state, or partly within and partly without the state, shall be liable as a common carrier, for the transportation of passengers or delivery of freight received by it to be transported by it to any place on the line of a connecting road; and if it shall become liable to pay any sum by reason of neglect or misconduct of any other corporation it may collect the same of the corporation by reason of whose neglect or misconduct it became liable.

This section was derived from the Railroad Law of 1890, § 48, as amended by L. 1892, ch. 676.

Provisions of Public Service Commissions Law relating to common carriers: see PUBLIC SERVICE COMMISSIONS LAW, articles II, III.

Railroad company may act as agent for owner of milk cans: see GENERAL BUSINESS LAW, § 273.

Effect on liability of initial carrier.— A similar provision was contained in L. 1847, ch. 270, sec. 9, and there was considerable doubt as to its application. In Root v. Great Western R. Co., (1871) 45 N. Y. 524, Rapallo, J., writing the opinion took the position that the sole purpose of the act was to make it clear that a contract by one road to carry goods to a point on another road was not ultra vires, and that the section did not alter the common law rule that a carrier receiving goods marked to a destination beyond his own line did not impliedly contract to deliver them at the destination marked, but only to deliver them safely to the next carrier. He also maintained that in any event if goods were delivered to a company expressly limiting its liability to its own line, the section could not be applied against the next carrier who received the goods generally marked for a point beyond its line, the section applying only to the initial carrier. Two judges fully concurred with Rapallo, J.; two dissented as to the first proposition. Four judges concurred only on the last ground. One dissented generally.

§ 71. Duties imposed. It shall be the duty of every railroad corporation operating its road by steam:

1. To lay, in the construction of new and in the renewal of existing switches, upon freight or passenger main line tracks, switches on the principle of either the so-called Tyler, Wharton, Lorenz, or split-point switch, or some other kind of safety switch, which shall prevent the derailment of a train, when such switch is misplaced or a switch interlocked with distant signals.

2. To erect and thereafter maintain such suitable warning signals at every road, bridge, or structure which crosses the railroad above the tracks, where such warning signals may be necessary, for the protection of employees on top of cars from injury.

3. To use upon every new freight car, built or purchased for use, couplers which can be coupled and uncoupled automatically, without the necessity of having a person guide the link, lift the pin by hand, or go between the ends of the cars.

4. To attach to every car used for passenger transportation an automatic air-brake or other form of safety-power brake, applied from the locomotive, excepting cars attached to freight trains, the

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schedule rate of speed of which does not exceed twenty miles an hour.

5. To provide each closed car in use in every passenger train owned or regularly used upon a railroad, with one set of tools, consisting of an axe, sledge hammer, crowbar and hand saw and such other or additional tools as the public service commission may require, to be placed where directed by the commission.

6. To provide, in each passenger car, where the line of road shall exceed forty continuous miles in length, a suitable receptacle for water, with a cup or drinking utensil attached upon or near such receptacle, and to keep such receptacle, while the car is in use, constantly supplied with cool water.

Every corporation, person or persons, operating such railroad, and violating any of the provisions of this section, except subdivision six, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that it shall omit or neglect to comply with any of such provisions. For every violation of the provisions of the sixth subdivision of this section every such corporation shall be liable to a penalty of twenty-five dollars for each offense.

This section was derived from the Railroad Law of 1890, § 49, as amended by L. 1898, ch. 521, § 1.

Couplers: see infra, § 80.

Air-brakes: see infra, § 79.

Duty of railroad company to block frogs, switches, and guard rails: see notes, 9 Ann. Cas. 498; 14 Ann. Cas. 696; Ann. Cas. 1916E 642.

Private action for violation of statute imposing duties on railroads: see L. R. A. 1915E 533, note.

Automatic couplers.— In Shaw v. Delaware, etc., R. Co., (1908) 126 App. Div. 210, 110 N. Y. S. 362, it appeared that the trial court charged the jury that while under subdivision 3 it was the duty of a railroad in the first instance to supply an automatic coupling device, yet its obligation to keep it in repair was the same as any other part of its equipment. As the plaintiff did not appeal the correctness of this charge was not passed on.

Air brakes.— The failure of a railroad to equip a train with air brakes does not render it liable for injury to an employee due to the train getting beyond control on a heavy grade, where there is no evidence that air brakes would have proved more effective than those which were furnishd. Wooden v. Western New York R. Co., (1895) 147 N. Y. 508, 42 N. E. 199. Where the provisions of subdivision 4 are not alluded to or relied upon on the trial of a negligence action they will not be considered on appeal. Cleary v. Long Island R. Co., (1900) 54 App. Div. 284, 66 N. Y. S. 568.

Low bridges, generally.— Subdivision 2 does not render the maintenance of low bridges illegal, but does require them to be guarded by telltales or warning signals. Harrison v. New York Cent., etc., R. Co., (1909) 195 N. Y. 86, 87 N. E. 802, modifying 127 App. Div. 804, 111 N. Y. S. 812. Even in the absence of this section it is the duty of a railroad to give some kind of warning of the proximity of a low bridge. Marcus v. Central R. Co., (1915) 170 App. Div. 158, 155 N. Y. S. 586.

Sufficiency of warning.— The statute requires suitable warning of low bridges, and telltales should be placed so far from the bridge that after giving warning there is time for an employee on a train to avoid the danger. Wallace v. Central Vermont R. Co., (1893) 138 N. Y. 302, 33 N. E. 1069. And see Marcus v. Central R. Co., (1915) 170 App. Div. 158, 155 N. Y. S. 586.

Repair of telltales.— "It is manifestly the duty of the company, not only to put up these telltales, but to use reasonable care that they are kept in

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order. It should be the duty of someone connected with the railroad to pay some attention to them and see that they are kept in order to answer the purpose of the statute." Wallace v. Central Vermont R. Co., (1893) 138 N. Y. 302, 33 N. E. 1069.

Contributory negligence.— Where a brakeman, who has passed over the road a number of times and knows of the presence of a bridge, is hit by a low bridge and injured, the absence of a warning signal may relieve him of the charge of contributory negligence. Wallace v. Central Vermont R. Co., (1893) 138 N. Y. 302, 33 N. E. 1069. Where there are several low bridges in close proximity and the railroad has erected warnings only on the outer side of the outer bridges to serve as a warning for all, an employee who has frequently been over the road and understands the situation cannot rely on a lack of signals at the inner bridges. Ryan v. Long Island R. Co., (1889) 51 Hun 607, 4 N. Y. S. 381, affirmed (1891) 124 N. Y. 654, 27 N. E. 413. Again, where an employee knows of the danger at a bridge and that there are no warning signals and yet, knowing that he is near the bridge, exercises no care to avoid it, he is guilty of contributory negligence precluding a recovery. Fitzgerald v. New York Cent., etc., R. Co., (1891) 59 Hun 225, 12 N. Y. S. 932.

Drinking water.— The mileage limitation on the duty to provide drinking water refers only to the time persons are likely to be on the car. Hence the statutory duty as to drinking water is imposed where the road exceeds forty miles of continuous length, though the excess is outside of the state. Op. Atty.-Gen. (1889) 35.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 72. Inspection of locomotive boilers. It shall be the duty of every railroad corporation operated by steam power, within this state, and of the directors, managers or superintendents of such railroad to cause thorough inspections to be made of the boilers and their appurtenances of all the steam locomotives which shall be used by such corporation or corporations, on said railroads. Said inspections shall be made, at least every three months under the direction and superintendence of said corporations, or the directors, managers or superintendents thereof, by persons of suitable qualifications and attainments to perform the services required of inspectors of boilers, and who from their knowledge of the construction and use of boilers and the appurtenances therewith connected, are able to form a reliable opinion of the strength, form, workmanship and suitableness of boilers, to be employed without hazard of life, from imperfections in material, workmanship or arrangment of any part of such boiler and appurtenances. All such boilers so used shall comply with the following requirements: The boilers must be made of good and suitable materials; the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat shall be of proper dimensions; the safety valves, fusible plugs, low water glass *indicater, gauge cocks and steam gauges, shall be of such construction, condition and arrangement that the same may be safely employed in the active service of the railroad corporation without peril to life; and each inspector shall satisfy himself by thorough examination that said requirements have been fully

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complied with. No boiler, nor any connection therewith shall be approved which is unsafe in its form, or dangerous from defects, workmanship or other cause. The person or persons who shall make the said inspections if he or they approve of the boiler or boilers and the appurtenances throughout, shall make and subscribe his or their name to a written or printed certificate which shall contain the number of each boiler inspected, the date of its inspection, the condition of the boiler inspected, and such details as may be required by the forms and regulations which shall be prescribed by the public service commission. Every certificate shall be verified by the oath of the inspector, and he shall cause such certificate or certificates to be filed in the office of the public service commission, within ten days after each inspection shall have been made, and also a copy thereof with the chief operating officer or employee of such railroad having charge of the operation of such locomotive boiler; a copy shall also be placed by such officer or employee in a conspicuous place in the cab connected with the locomotive boiler inspected, and there kept framed under glass. The public service commission shall have power, from time to time, to formulate rules and regulations for the inspection and testing of boilers as aforesaid, and may require the removal of incompetent inspectors of boilers under the provisions of this section. Copies of such rules and regulations shall be mailed to every corporation operating a railroad by steam in this state. If it shall be ascertained by such inspection and test or otherwise, that any locomotive boiler is unsafe for use, the same shall not again be used until it shall be repaired, and made safe, so as to comply with the requirements of this section. Every corporation, director, manager or superintendent operating such railroad and violating any of the provisions of this section shall be liable to a penalty, to be paid to the people of the state of New York, of one hundred dollars for each offense, and the further penalty of one hundred dollars for each day it or he shall omit or neglect to comply with said provisions, and the making or filing of a false certificate shall be a misdemeanor, and every inspector who wilfully certifies falsely touching any steam boiler, or any appurtenance thereto belonging, or any matter or thing contained or required to be contained in any certificate, signed and sworn to by him, shall be guilty of a misdemeanor. Any person, upon application to the secretary of said commission and on the payment of such reasonable fee as said commission may by rule fix, shall be furnished with a copy of any such certificate. The public service commission shall enforce the provisions of this section as to penalties.

This section was derived from the Railroad Law of 1890, § 49-a, as added by L. 1905, ch. 611, § 1, and amended by L. 1907, ch. 208, § 1.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

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§ 73. State inspector of locomotive boilers. The office of state inspector of locomotive boilers is continued. Said inspector shall be appointed by the public service commissions and shall receive a compensation to be fixed by the commission, not exceeding three thousand dollars per year. He shall, under the direction of the commission, inspect boilers or locomotives used by railroad corporations operating steam railroads within the state, and may cause the same to be tested by hydrostatic test and shall perform such other duties in connection with the inspection and test of locomotive boilers as the commission shall direct. But this section shall not relieve any railroad corporation from the duties imposed by the preceding section.

This section was derived from the Railroad Law of 1890, § 49-b, as added by L. 1905, ch. 611, § 2.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 74. Care of steam locomotives; steam and water cocks; penalty. It shall be the duty of every corporation operating a steam railroad, within this state, and of its directors, managers or superintendents, to cause the boiler of every locomotive used on such railroad to be washed out as often as once every thirty days, and to equip each boiler with and maintain thereon at all times, a water glass, showing the height of water in the boiler, having two valves or shut-off cocks, one at each end of such glass, which valves or shut-off cocks shall be so constructed that they can be easily opened and closed by hand; also to cause such valves or shut-off cocks and all gauge cocks or try-cocks attached to the boiler to be removed and cleaned whenever the boiler is washed out pursuant to the foregoing requirements of this section; also to keep all steam valves, cocks and joints, studs, bolts and seams in such repair that they will not at any time emit steam in front of the engineer, so as to obscure his vision. No locomotive shall hereafter be driven in this state unless the same is equipped and cared for in conformity with the provisions of this section; but nothing herein contained shall be construed to excuse the observance of any other requirement imposed by this chapter upon railroad corporations, their directors, officers, managers and superintendents. Every corporation, person or persons operating a steam railroad and violating any of the provisions of this section, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that such violation shall continue. The public service commission shall enforce the provisions of this section.

This section was derived from the Railroad Law of 1890, § 49-c, as added by L. 1907, ch. 208, § 2.

Unauthorized pressure of steam: see PENAL LAW, § 1891.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

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§ 75. Public service commission may approve other safeguards. The public service commission may, on the application of any railroad corporation, authorize it to use any other safeguard or device approved by the commission, in place of any safeguard or device hereinbefore required by this article, which shall thereafter be used in lieu thereof, and the same penalties for neglect or refusal to use the same shall be incurred and imposed as for a failure to use the safeguard or device hereinbefore required, in lieu of which the same is to be used.

This section was derived from the Railroad Law of 1890, § 50.

Power of public service commissions to order repairs or changes to promote public convenience or safety: see PUBLIC SERVICE COMMISSIONS LAW, § 50.

§ 76. Use of stoves or furnaces prohibited; exceptions.[1] It shall not be lawful for any railroad corporation operating a steam railroad in this state of the length of fifty miles or more, excepting foreign railroad corporations incorporated without the jurisdiction of the United States running cars upon tracks in this state for a distance of less than thirty miles, to heat its passenger cars on other than mixed trains, excepting dining[2] cars, by any stove or furnace kept inside the car or suspended therefrom, unless in case of accident or other emergency, when it may temporarily use such stove or furnace with necessary fuel; and in cars which have been equipped with apparatus to heat by steam, hot water or hot air from the locomotive or from a special car, the present stove may be retained to be used only when the car is standing still; and no stove or furnace shall be used in a dining[2] car except for cooking purposes, and of pattern and kind to be approved by the public service commission; [3]provided that passenger cars propelled by means of gasoline or oil engines may be heated in a manner to be approved by the public service commission. This section shall not be held to affect or interfere with the use by the commissioners of fisheries of this or other states, or of the United States, of stoves for heating or cooking or boilers for hatching operations in their fish car or cars. Any person or corporation violating any of the provisions of this section shall be liable to a penalty of one thousand dollars, and to the further penalty of one hundred dollars for each and every day during which such violation shall continue.

This section was derived from the Railroad Law of 1890, § 51, as amended by L. 1896, ch. 299, § 1. It was amended to read as above by L. 1914, ch. 69. The changes are shown in the footnotes.

Heating apparatus of passenger cars: see PENAL LAW, § 1987.

Constitutionality.— The classification of railroads by this section is reasonable and the section may be applied to interstate trains in the absence of federal legislation on the same subject. New York, etc., R. Co. v. People, (1896) 165 U. S. 628, 17 S. Ct. 418, 41 U. S. (L. ed.) 853, affirming (1894)

[1] Word "exceptions" new.
[2] Formerly "dining-room."
[3] Remainder of sentence new.

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142 N. Y. 646, 37 N. E. 568; People v. New York, etc., R. Co., (1890) 55 Hun 409, 608, 8 N. Y. S. 672, affirmed on opinion below (1890) 123 N. Y. 635, 25 N. E. 953.

Former provisions.— L. 1887, ch. 616, while operating on the same subject as this section, contained materially different provisions. That act was construed in People v. Clark, (1891) 82 N. Y. Crim. 169, 179, 14 N. Y. S. 642.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 77. Equipment of engines. It shall be unlawful for any railroad company to use within the state on its line or lines any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, or to use any locomotive engine operated by steam not equipped with a mechanically operated door to the fire box of such locomotive engine. Such mechanically operated door shall be so constructed and operated by steam, compressed air, electricity or other means as deemed best and most efficient by the officers of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman on said engine by means of a push button or other appliance located in the floor of the deck or floor of the tender at a suitable distance from such door to enable the fireman while firing such engine, by pressure with his foot to open such door for the firing of such engine; provided, however, that such mechanically operated doors shall not be required on locomotives equipped with mechanical stokers; and provided further that nothing in this section shall be construed to inhibit the passage of a locomotive engine not so equipped with such mechanically operated door, moving under its own steam either with or without a train, when such movement is from a point without this state through and to a point beyond its borders, or from a point without this state to a point within it, or from a point within this state to a point without it if such passage is for the purpose of moving it to or from a repair shop or shops for the purpose of repairing such locomotive engine, and when it is not intended for service within this state.

This section was derived from L. 1893, ch. 543, § 1. It was amended by L. 1917, ch. 370, § 1. The amendment added everything after the first comma. Sections 2 and 3 of the amending act provided as follows: "§ 2. All new locomotive engines in service, after this act shall take effect, shall be equipped with such mechanically operated doors. As to all locomotive engines not actually in service, nor assigned to or held for such service, within this state at the time of the passage of this act, it shall take effect on and after the first day of January, nineteen hundred and nineteen. As to any locomotive engine or engines in actual service, or assigned to and held for such service, within this state, when this act shall take effect, the same may be continued in service until it is necessary to withdraw it or them for repairs; and every locomotive engine so withdrawn from service for repairs shall be properly equipped with such mechanically operated fire box doors before it shall be returned to service.

"§ 3. This act shall take effect January first, nineteen hundred and nineteen."

Requirement of automatic bells on locomotives: see Ann. Cas. 1914D 1289, note.

Meaning of "equip" or "equipment" within statute relating to railroads: see Ann. Cas. 1913B 198, note.

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§ 78. Coal jimmies and caboose cars.[1] The use of cars known and designated as "coal jimmies" in any form and the use of any car as a caboose unless it shall have a suitable and safe platform at each end thereof, and the usual railing for the protection of persons using such platform, shall be unlawful within the state, except upon any railroad whose main line is less than fifteen miles in length and whose average grade exceeds two hundred feet to the mile. This section shall not be construed to authorize the interchange of such "coal jimmies" with, and the use thereof upon, railroads of more than fifteen miles in length or whose average grade is less than two hundred feet to the mile.

[2] From and after the first day of July, nineteen hundred and twenty, it shall be unlawful for any corporation or individual to man, equip, or to use within the state on any railroad a caboose car, or car to serve the purpose of a caboose car, which shall be less than twenty-four feet in length exclusive of the platform, or which shall have a center constructive strength less than that of the fifty ton freight cars built according to master car builders' standards. Such caboose or other equivalent car shall be constructed with steel center sills with two four-wheel trucks; with each platform not less than twenty-four inches wide, with proper guard rails, grab irons and steps, which shall be equipped with a suitable rod, board or other guard designed to prevent slipping from the car step. Each such car shall have a door at each end and shall be equipped with four separate sleeping berths not less than six feet and two inches in length. Each such car shall contain a properly furnished toilet room, sink, ice box, water cooler, clothing lockers, and with a cupola of sufficient size to accommodate at least two men. Whenever any caboose or other car used for like purpose now in use by any such railroad company shall, after this act goes into effect, be brought into any shop for general repairs it shall be unlawful to again put the same into use within this state, as a caboose or other car used for like purpose unless it be equipped as provided in this act.

This section shall not apply to cabooses or other equivalent cars used in the switching service or on trains operated wholly within twenty-five miles of yard limits.

Any violation of the provisions of this section shall be a misdemeanor, punishable by a fine of not less than one hundred dollars nor more than five hundred dollars for each separate offense. This penalty is in addition to that provided for in section eighty-one of this chapter.

This section was derived from L. 1893, ch. 543, § 2, as amended by L. 1900, ch. 549, § 1. It was amended to read as above by L. 1913, ch. 497. The changes made are shown in the footnotes.

[1] Words "and caboose cars" new.
[2] Remainder of section new.

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§ 79. Air-brakes. It shall be unlawful for any railroad or other company to haul or permit to be hauled or used on its line or lines within this state any freight train that has not a sufficient number of cars in it so equipped with continuous power or air-brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

This section was derived from L. 1893, ch. 543, § 3, as amended by L. 1900, ch. 549, § 2.

Meaning of "equip" or "equipment" within statute relating to railroads: see Ann. Cas. 1913B 198, note.

Violation as negligence.—Where a train is not equipped with air brakes as required by this section this is negligence rendering it liable to an employee injured thereby. Hickey v. New York Cent., etc., R. Co., (1914) 163 App. Div. 270, 148 N. Y. S. 795.

§ 80. Couplers. It shall be unlawful for any railroad or other company to haul, or permit to be hauled or used, on its line or lines within the state, any freight car not equipped with couplers of the master car builders' type, and coupling automatically by impact, and which can be uncoupled, except in cases of accident, without the necessity of men going between the ends of the cars.

This section was derived from L. 1893, ch. 544, § 3.

Automatic couplers: see PENAL LAW, § 1988.

What vehicles, cars, etc., are within statute requiring equipment with automatic couplers: see Ann. Cas. 1913A 949, note.

Meaning of "equip" or "equipment" within statute relating to railroads: see Ann. Cas. 1913B 198, note.

Failure of railroad to equip cars with automatic couplers as negligence per se: see 10 Ann. Cas. 701, note.

§ 81. Violation of four preceding sections. Any railroad or other company hauling or permitting to be hauled on its line or lines any train in violation of any of the provisions of the preceding four sections shall be liable to a penalty of one hundred dollars for each and every violation, to be recovered in an action to be brought by the public service commission in the name of the people and in the judicial district wherein the principal office of the company within the state is located.

This section was derived from L. 1893, ch. 543, § 5. as amended by L. 1900, ch. 549, § 3.

§ 82. Canada thistles to be cut. Every railroad corporation doing business within this state, shall cause all Canada thistles, white and yellow daisies and other noxious weeds growing on any lands owned or occupied by it, to be cut down twice in each and every year, once between the fifteenth day of June and the twenty-fifth day of June, and once between the fifteenth day of August and the twenty-fifth day of August. If any such corporation shall neglect to cause the same to be so cut down, any person may cut the same, between the twenty-fifth day of June and the fifth day

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of July inclusive, and between the twenty-fifth day of August and the fifth day of September inclusive in each year, at the expense of the corporation on whose lands the same shall be so cut, at the rate of three dollars per day for the time occupied in cutting.

This section was derived from the Railroad Law of 1890, § 52.

Cited.— This section was cited in People v. Long Island R. Co., (1909) 194 N. Y. 130, 87 N. E. 79.

§ 83. Riding on platform; walking along track. No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passenger inside such passenger cars. No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same. Any person riding, leading or driving any horse or other animal upon any railroad, or within the fences and guards thereof, other than at a farm or street or forest crossing, without the consent of the corporation, shall forfeit to the people of the state the sum of ten dollars, and pay all damages sustained thereby to the party aggrieved.

This section was derived from the Railroad Law of 1890, § 53, as amended by L. 1892, ch. 676.

I. Riding on platform, 125
II. Walking on tracks, 126

I. Riding on Platform.

Platforms of passenger cars: see Penal Law, § 1987.
Riding on engine or train without authority: see Penal Law, § 1990.
Boarding cars in motion: see Penal Law, § 1990.

Application to street railway.— Section 46 of the Railroad Act of 1850, the predecessor of this section, was held not to apply to a street railway, so far as riding on the platform was concerned. Vail v. Broadway R. Co., (1895) 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626; Wood v. Brooklyn City R. Co., (1896) 5 App. Div. 492, 38 N. Y. S. 1077. The question had been previously left open in Hayes v. Forty-Second St., etc., Ferry R. Co., (1884) 97 N. Y. 259. It was also held not to apply to a horse railway. Fox v. Forty-Second, etc., R. Co., (1880) 46 Super. Ct. 448; Vail v. Broadway R. Co., (1893) 31 Abb. N. Cas. 56, 26 N. Y. S. 59. That this section applied to street railways was assumed in Lynch v. Second Ave. R. Co., (1896) 7 App. Div. 164, 39 N. Y. S. 1103.

Using platform as means of access.— The prohibition against riding on the platform does not apply to one merely using the platform as a means of entering the car. Morris v. Eighth Ave. R. Co., (1893) 68 Hun 39, 22 N. Y. S. 666.

Passing from one car to another.— It is not negligence *per se* for a passenger to pass from a coach to a smoking car while the train is in motion, under this section. Costikyan v. Rome, etc., R. Co., (1891) 58 Hun 590, 12 N. Y. S. 683, affirmed (1891) 128 N. Y. 633, 29 N. E. 147.

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Lack of accommodations.—A person is not guilty of contributory negligence as a matter of law in riding on the platform of a car if there is not sufficient room for him in the car. Graham v. Manhattan R. Co., (1896) 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. 305, 28 N. Y. S. 739; Lehr v. Steinway, etc., R. Co., (1890) 118 N. Y. 556, 23 N. E. 889; Clark v. Eighth Ave. R. Co., (1867) 36 N. Y. 135, 93 Am. Dec. 495; Willis v. Long Island R. Co., (1866) 34 N. Y. 670; Wood v. Brooklyn City R. Co., (1896) 5 App. Div. 492, 38 N. Y. S. 1077; McGrath v. Brooklyn, etc., R. Co., (1895) 87 Hun 310, 34 N. Y. S. 365; Morris v. Eighth Ave. R. Co., (1893) 68 Hun 39, 22 N. Y. S. 666.

Sufficiency of notice.— A notice is insufficient which states that "passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk." Nolan v. Brooklyn City, etc., R. Co., (1881) 87 N. Y. 63, 41 Am. Rep. 345.

Waiver of rule.— The mere fact that a conductor does not object to passengers standing on the platform, where notices are properly posted, is not a waiver of the protection of the statute. Higgins v. New York, etc., R. Co., (1857) 2 Bosw. 132.

Pleading violation.— Where a railroad claims immunity from liability in an action for injuries to a passenger on the platform of a car, it must plead all the facts entitling it to immunity. Vail v. Broadway R. Co., (1895) 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626.

Raising question on appeal.— Where attention to the statutory prohibition is not called on the trial, although the defendant has offered evidence of the posting of rules prohibiting riding on platforms, the court on appeal will not consider the effect of the statute. Schreiner v. New York Cent., etc., R. Co., (1896) 12 App. Div. 551, 42 N. Y. S. 163.

Cited.—This provision was cited in Merwin v. Manhattan R. Co., (1888) 48 Hun 608, 1 N. Y. S. 267, affirmed (1889) 113 N. Y. 659 mem.; Kittell v. Erie R. Co., (1917) 176 App. Div. 430, 163 N. Y. S. 640 (construing similar New Jersey statute).

II. Walking on Tracks

Duty to equip train so as to avoid or minimize injury to persons on tracks: see L. R. A. 1915A 742, note.

Posting signs warning trespassers as affecting liability of railroad company for injury to person walking on track: see 47 L. R. A. (N. S.) 506, note.

Duty of railroads to anticipate presence of trespassing children on tracks: see 4 Ann. Cas. 680, note; 16 Ann. Cas. 247, note; Ann. Cas. 1916B 357, note.

Liability of railroad for injury to person other than servant on railroad bridge or trestle: see Ann. Cas. 1914D 1210, note.

Liability of railroad running train in violation of speed law, for injuries to trespassers: see 5 Ann. Cas. 1007, note.

Duty of person working on railroad track to look out for and avoid passing trains: see 8 Ann. Cas. 332, note; Ann. Cas. 1913A 440, note.

Standing or walking so close to railroad track as to be injured by passing train as negligence: see Ann. Cas. 1912B 1242, note.

Running train without headlight as negligence towards person on track at place other than crossing: see Ann. Cas. 1912A 153, note.

Failure of railroad to sound statutory crossing signal as negligence toward person on track at place other than crossing: see 16 Ann. Cas. 1110, note.

Trespass by traveling along railroad right of way: see 2 Ann. Cas. 548, note; 20 Ann. Cas. 140, note.

Duty of railroad to keep lookout for children on track as applicable to private railroad: see Ann. Cas. 1914A 671, note.

In general.— It seems that this section may affect the acquisition of a private right of way across railroad lands by prescription. Heaton v. New York Cent., etc., R. Co., (1914) 86 Misc. 467, 149 N. Y. S. 71.

Unopened street.— The fact that a street was designated on ancient maps at a certain place which crosses a railroad gives no right to cross at such place where the land is fenced and the street has never been opened. Loughman v. Long Island R. Co., (1903) 83 App. Div. 629, 81 N. Y. S. 1097.

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Violation as misdemeanor.— It seems that a violation of this section in walking on a railroad track is made a misdemeanor by section 29 of the Penal Law. Marra v. New York Cent., etc., R. Co., (1910) 139 App. Div. 707, 124 N. Y. S. 443. But in Lehman v. Great Eastern Casualty, etc., Co., (1896) affirmed on opinion below (1899) 158 N. Y. 689, 53 N. E. 1127, 7 App. Div. 424, 39 N. Y. S. 912, it was said that there was no penalty attached to a violation of this section.

Rescuing person from crossing.— A person having no occasion to cross tracks at a regular crossing is not a trespasser where he goes on the tracks to warn off small children who are playing there in danger of injury from an approaching train. Spooner v. Delaware, etc., R. Co., (1889) 115 N. Y. 22, 21 N. E. 696.

Obstruction of crossing.— Where a railroad obstructs a street crossing for an unreasonable length of time a person having occasion to cross may walk around the standing train on the railroad premises and in so doing is not a trespasser under this section. Kurt v. Lake Shore, etc., R. Co., (1908) 127 App. Div. 838, 111 N. Y. S. 859, affirmed (1909) 194 N. Y. 598, 88 N. E. 1122.

Detaining person on tracks.— Where a railroad company is charged with having, through an officer employed by it, arrested a person walking on its tracks and detaining him on the tracks where he was injured, there can be no recovery unless its act was reckless or wanton. Marra v. New York Cent., etc., R. Co., (1910) 139 App. Div. 707, 124 N. Y. S. 443.

Passenger carried beyond destination.— Where a passenger is carried beyond his station and is disembarked at the next station connecting with a highway, he is guilty of a violation of this section in returning to his station on the railroad right of way, but such is not the case when the train is stopped for the purpose of permitting him to alight between stations. Luther v. Fonda, etc., R. Co., (1914) 160 App. Div. 366, 145 N. Y. S. 407.

Exception of employees.— The exception of a person employed upon the railroad does not apply to a person employed in a railroad shop to which a regular crossing is provided who walks along the track to reach his place of work. The fact that the railroad owns the shop is a mere coincidence. McIntyre v. Long Island R. Co., (1912) 150 App. Div. 783, 135 N. Y. S. 309. The exception of employees connected with or employed upon the railroad means employed on the railroad owning and using the tracks and does not operate in favor of an employee of another railroad whose tracks are adjacent. Feeck v. Delaware, etc., R. Co., (1916) 174 App. Div. 71, 158 N. Y. S. 825.

Effect of user.— Where for a number of years the public, with the acquiescence and permission or consent of the railroad company, has been accustomed to cross railroad tracks at a point other than a street crossing, the railroad is bound to exercise reasonable care to protect a person crossing at that point from injury, and this section does not apply. Lamphear v. New York Cent., etc., R. Co., (1909) 194 N. Y. 172, 86 N. E. 1115; Byrne v. New York Cent., etc., R. Co., (1887) 104 N. Y. 362, 10 N. E. 539, 58 A. S. R. 512; Barry v. New York Cent., etc., R. Co., (1883) 92 N. Y. 289, 44 Am. Rep. 377. See, however, Nicholson v. Erie R. Co., (1870) 41 N. Y. 525. Nor can one who attempts to cross railroad tracks at a place where the public, with the acquiescence of the railroad, has been in the habit of crossing for a long period of time be said to be violating the law, within the meaning of an insurance policy. Lehman v. Great Eastern Casualty, etc., Co., (1896) 7 App. Div. 424, 39 N. Y. S. 912, affirmed on opinion below (1899) 158 N. Y. 689, 53 N. E. 1127. Where, however, the crossing of a railroad at a certain point has not been by the public generally, but mere individual trespassers, a person crossing the tracks at that point is a trespasser. Clark v. New York Cent., etc., R. Co., (1905) 104 App. Div. 167, 93 N. Y. S. 525. And user, no matter how long continued, cannot create a license to walk along and upon railroad tracks and a railroad is under no duty to a person so walking along its tracks other than not to injure him intentionally or wantonly. Keller v. Erie R. Co., (1905) 183 N. Y. 67, 75 N. E. 965, affirming 98 App. Div. 550, 90 N. Y. S. 236; Butler v. New York Cent., etc., R. Co., (1907) 152 Fed. 976, 82 C. C. A. 330. Where persons are permitted by sufferance to use a path along a railroad, they are mere licensees and not invitees so that for mere passive negligence, as by leaving a torpedo on the tracks, the railroad is not liable. Holmes v. Delaware, etc., Co., (1908) 128 App. Div. 24, 112 N. Y. S. 421.

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§ 84. Corporations may establish ferries. Any steam railroad corporation, incorporated under the laws of this state, with a terminus in the harbor of New York, may purchase or lease boats propelled by steam or otherwise, and operate the same as a ferry or otherwise, over the waters of the harbor of New York, but this section shall not be construed to affect the rights of the city of New York.

This section was derived from the Railroad Law of 1890, § 54, as amended by L. 1892, ch. 676.

Ferry corporations generally: **see TRANSPORTATION CORPORATIONS LAW, § 2 et seq.**

Questioning power of railroad.—A private citizen cannot, in a taxpayer's action, question the right of a railroad to acquire a ferry franchise under this section. Starin v. Edson, (1889) 112 N. Y. 206, 19 N. E. 670, reversing 42 Hun 549, 4 N. Y. St. Rep. 588.

§ 85. Certain railroads may cease operation in winter. The directors of any railroad corporation operating a railroad, constructed and used principally for transporting lumber or ores, during the summer months, or for summer travel, may, by a resolution duly passed at a meeting thereof, apply to the public service commission for permission to cease the operation of their road during the winter season, for a period not exceeding seven months in any one year, specifying the date of such suspension, and the date of the reopening thereof; and such commission may, in its discretion, make an order granting the application wholly or in part, and thereupon such railroad corporation shall be relieved of the duty of operating its road during the period specified in the order. A copy of such order shall be posted in all depots and at the termini of such railroad, and published in every newspaper in each town in any part of which such road shall be constructed at least four weeks prior to the date of such suspension.

This section was derived from the Railroad Law of 1890, § 55.

Right of railroad to abandon operation of its road: **see L. R. A. 1915A 549, note.**

§ 86. Certain railroads need not be operated beyond June, July, August and September. Subject to the permission and approval of the public service commission, any corporation, whose railroad is or shall be not longer than sixteen miles and is or shall be in large part intended for or used in summer travel or the convenience of summer sojourners need not operate its road beyond the months of June, July, August and September, inclusive. The motive power may be electricity. If the road be not longer than ten miles, such corporation may fix and collect fare for transporting each passenger, together with ordinary baggage, if any, not to exceed fifteen cents for each mile and fraction thereof.

This section was derived from the Railroad Law of 1890, § 21, as added by L. 1892, ch. 700.

Right of railroad to abandon operation of its road: **see L. R. A. 1915A 549, note.**

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§ 87. Mails. Any railroad corporation shall, when applied to by the postmaster-general, convey the mails of the United States on its road, and in case such corporation and the postmaster-general shall not agree as to the rate of transportation therefor, and as to the time, rate of speed, manner and condition of carrying the same, the public service commission shall fix the prices, terms and conditions therefor, after giving the corporation reasonable opportunity to be heard. Such price shall not be less for carrying such mails in the regular passenger trains than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the post-office car. If the postmaster-general shall require the mail to be carried at other hours, or at higher speed than the passenger trains are run, the corporation shall furnish an extra train for the mail, and be allowed an extra compensation for the expenses and wear and tear thereof, and for the service to be fixed as herein provided.

Every railroad corporation refusing or neglecting to comply with any provision of this section shall forfeit to the people of the state one hundred dollars for every day such neglect or refusal continues.

This section was derived from the Railroad Law of 1890, § 56, as added by L. 1892, ch. 676, § 1.

Exemption from liability for injuries.— There is no authority for the postal authorities as a part of a contract for the carriage of mails to stipulate for exemption from liability for injuries to railway mail agents. Seybolt v. New York, etc., R. Co., (1884) 95 N. Y. 562, 47 Am. Rep. 75.

Action by mail agent on contract.— An express contract between the government and a railroad to carry mail and a mail agent is not one on which the mail agent may sue, though in a proper action he may rely on the contract as establishing the relation of carrier and passenger. Nolton v. Western R. Corp., (1857) 15 N. Y. 444, 69 Am. Dec. 623.

§ 88. When conductors and brakemen may be policemen. The governor may appoint any conductor or brakeman on any train conveying passengers on any steam railroad in this state, a policeman, with all the powers of a policeman in cities and villages, for the preservation of order and of the public peace, and the arrest of all persons committing offenses upon the land or property of the corporation owning or operating such railroad; and he may also appoint, on the application of any such corporation, or of any steamboat company, such additional policemen, designated by it, as he may deem proper, who shall have the same powers. Every such policeman shall within fifteen days after receiving his commission, and before entering upon the duties of his office, take and subscribe the constitutional oath of office, and file it with his commission in the office of the secretary of state. [1]The post-office address of the person appointed shall appear in the commission, and whenever such address is changed the person appointed shall file with the governor a statement of the new address. Every

[1] Following sentence new.

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such policeman shall when on duty wear a metallic shield with the words "railroad police" or "steamboat police," as the case may be, and the name of the corporation for which appointed inscribed thereon, which shall always be worn in plain view, except when employed as a detective. The compensation of every such policeman shall be such as may be agreed upon between him and the corporation for which he is appointed, and shall be paid by the corporation. When any corporation shall no longer require the services of any such policeman it may file notice to that effect in the office in which notice of his appointment was originally filed, and thereupon such appointment shall cease and be at an end. [2]The governor may also at pleasure revoke the appointment of any such policeman by filing a revocation thereof in the office of the secretary of state and mailing a notice of such filing to the corporation for which he was appointed, and also to the person whose appointment is revoked, at his last post-office address as the same appears in the commission or the latest statement thereof on file. If such person thereafter, knowing of such revocation or having in any manner received notice thereof, exercises or attempts to exercise any of the powers of a policeman, under this section, he shall be guilty of a misdemeanor; and the filing and mailing of such notice, as above provided, shall be presumptive evidence that such person knew of the revocation.

This section was derived from the Railroad Law of 1890, § 58, as amended by L. 1906, ch. 380, § 1. It was amended to read as above by L. 1911, ch. 817. The amendments are shown in the footnotes.

Jurisdiction.— The governor has no power to appoint a policeman for a certain station with authority to act also in other counties. Op. Atty.-Gen. (1901) 215.

Free passes.— While a railroad policeman appointed under this section is a public officer, a pass issued to him in part consideration for his services is not a "free pass" within the meaning of section 5 of article 13 of the Constitution prohibiting officers from receiving or using free passes. Dempsey v. New York Cent., etc., R. Co., (1895) 146 N. Y. 290, 40 N. E. 867.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 89. New railroads across streets. All steam surface railroads built after the first day of July, eighteen hundred and ninety-seven, except additional switches and sidings, must be so constructed as to avoid all public crossings at grade, whenever practicable so to do. Whenever application is made to the public service commission under section nine of this chapter there shall be filed with the commission a map showing the streets, avenues, highways and roads proposed to be crossed by the new construction, and the commission shall determine whether such crossings shall be under or over the proposed railroad, except where the commission shall determine such method of crossing to be impracticable. Whenever an application is made under this section

[2] Remainder of section new.

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to determine the manner of crossing, the commission shall designate a time and place when and where a hearing will be given to such railroad company, and shall notify the municipal corporation having jurisdiction over the streets, avenues, highways or roads proposed to be crossed by the new railroad. The commission shall also give public notice of such hearing in at least two newspapers, published in the locality affected by the application, and all persons owning land in the vicinity of the proposed crossing shall have the right to be heard. Upon such a notice and after a hearing, the public service commission may determine that alterations or changes may be made in any existing highway, at or in the vicinity of a proposed crossing for the purpose of avoiding a crossing at grade.

The decision of the commission rendered in any proceedings under this section shall be communicated, within twenty days after final hearing, to all parties to whom notice of the hearing in said proceedings was given, or who appeared at said hearing by counsel or in person.

This section was derived from the Railroad Law of 1890, § 60, as added by L. 1897, ch. 754. It was amended by L. 1913, ch. 425; L. 1913, ch. 744; L. 1914, ch. 378.

In general.— "Upon the subject of the 'point of crossing' where the laws relating to crossings of railroads and grade crossings at public highways are both applicable, that relating to grade crossings is paramount." New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624. The questions to be decided under this section arise subsequent to the issuance of a certificate under section 9 and upon the commencement of actual construction work. Frontier v. Public Service Commission, (1913) 155 App. Div. 57, 139 N. Y. S. 627.

Retroactive operation.—This section relates only to railroads constructed after the passage of the section. Yonkers v. New York Cent., etc., R. Co., (1898) 32 App. Div. 474, 52 N. Y. S. 1074, affirmed (1900) 165 N. Y. 142. But it is not confined to construction by railroads organized after the section was enacted, but applies to pre-existing corporations. Matter of Erie R. Co., (1913) 208 N. Y. 486, 102 N. E. 562, reversing 151 App. Div. 900, 135 N. Y. S. 1110. The fact that a corporation was organized and procured a certificate under section 9 before this section was enacted does not exempt it from the requirements of this section in subsequently constructing its road across a highway, and it must first procure an order of the Public Service Commission. Bolivar v. Pittsburg, etc., R. Co., (1903) 88 App. Div. 387, 84 N. Y. S. 678, affirmed on opinion below (1904) 179 N. Y. 1141.

Additional track at crossing.— This section applies to the laying of an additional main track across a highway. Op. Atty.-Gen. (1903) 374. Where a new track is constructed across a highway adjoining other tracks crossing on grade, while the railroad must bear all the expense of avoiding crossing at grade so far as the new track is concerned, the municipality must bear its share of the expense, under section 94, so far as the elimination of the old crossing is concerned. Matter of Erie R. Co., (1913) 208 N. Y. 486, 102 N. E. 562, reversing 151 App. Div. 900, 135 N. Y. S. 1110; Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 760, 121 N. Y. S. 524, modified in (1910) 200 N. Y. 121, 93 N. E. 515; Op. Atty.-Gen. (1906) 466.

Exception of switches and sidings.— The exception of switches and sidings was inserted for the benefit of railroads, and the Public Service Commission has power, on the waiver of the exception by a railroad, to order the elimination of a grade crossing on the construction of additional switches or sidings. Matter of Buffalo Terminal Ry., (1907) 122 App. Div. 59, 106 N. Y. S. 655, affirmed (1908) 192 N. Y. 534, 84 N. E. 1121.

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Determination of manner of crossing.— This section does not contemplate that the question of the manner of crossing shall be determined in a proceeding for a certificate of convenience under section 9, but in an independent proceeding subsequently instituted. People v. Board of Com'rs, (1908) 126 App. Div. 492, 110 N. Y. S. 862. No action of local authorities can take the place of an order of the Public Service Commission permitting a grade crossing, and consent of local authorities to a change of route involving a grade crossing does not estop them from subsequently objecting to a crossing at grade. Bolivar v. Pittsburg, etc., R. Co., (1903) 88 App. Div. 387, 84 N. Y. S. 678, affirmed on opinion below (1904) 179 N. Y. 523, 71 N. E. 1141.

Taxation of bridge.— A railroad bridge across a street is tangible property used in connection with a special franchise, and is taxable as such. Op. Atty.-Gen. (1915) 304.

Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64); Melenbacker v. Salamanca, (1907) 188 N. Y. 370, 80 N. E. 1090, affirming 116 App. Div. 691, 101 N. Y. S. 1073 (see sec. 94); People v. Delaware, etc., Co., (1904) 177 N. Y. 337, 69 N. E. 651, affirming 81 App. Div. 335, 81 N. Y. S. 478 (see sec. 91); People v. Public Service Commission, (1909) 130 App. Div. 335, 114 N. Y. S. 636 (see sec. 91).

§ 90. New streets across railroads. When a new street, avenue, highway or road or new portion or additional width[1] of a street, avenue, highway or road, or a state or county highway or county road deviating from the line of an existing highway or road, shall hereafter be constructed across a steam surface railroad, other than pursuant to the provisions of section ninety-one of this chapter, such street, avenue, highway or road or portion of such street, avenue, highway or road, shall pass over or under such railroad or at grade, as the public service commission shall direct. Notice of intention to lay out such street, avenue, highway, or road, or new portion of a street, avenue, highway or road, across a steam surface railroad shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue, highway or road by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. In case of the construction of a state or county highway which deviates from the line of an existing highway across a steam surface railroad, a like notice shall be given to such railroad company by the state commission of highways at least fifteen days prior to the adoption of the maps, plans and specifications for such state or county highway by such commission. Such notice shall designate the time when and place where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road,[2] or before the state commission of highways in case of a state or county highway, on the question of the location

[1] Words "or additional width," new.

[2] Words "or new portion or additional width of such street, avenue, highway or road," new.

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of such highway. If the municipal corporation determines such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road[2] to be necessary, or if the state commission of highways determines that such state or county highway which deviates from the line of an existing highway shall be constructed across such railroad at the place indicated in the maps, plans and specifications therefor, such municipal corporation or commission of highways shall then apply to the public service commission before any further proceedings are taken, to determine whether such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road[2] shall pass over or under such railroad or at grade. The public service commission shall thereupon appoint a time and place for hearing such application, and shall give such notice thereof as it shall judge reasonable, not however less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue, highway or road, or new portion or additional width[1] of a street, avenue, highway or road, to the state commission of highways, or in the case of a state or county highway which deviates from the line of an existing highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue, highway or road to be opened, extended or constructed. The public service commission shall determine whether such street, avenue, highway or road, or new portion or additional width[1] of a street, avenue, highway or road, or state or county highway shall be constructed over or under such railroad or at grade. If said commission shall determine that such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road [2] shall be carried across such railroad above grade, then said commission shall determine the height, the length and the material of the bridge or structure by means of which such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road[2] shall be carried across such railroad, and the length, character and grades of the approaches thereto. If said commission shall determine that such street, avenue, highway or road shall be constructed or extended below the grade, said commission shall determine the manner and method in which the same shall be so carried under, and the grade or grades thereof, and if said commission shall determine that said street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road[2] shall be constructed or extended at grade, said commission shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained. The decision of the commis-

[1] Words "or additional width," new.

[2] Words "or new portion or additional width of such street, avenue, highway or road," new.

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sion as to the manner and method of carrying such new street, avenue, highway or road, or new portion or additional width [1] of a street, avenue, highway or road, or state or county highway which deviates from the line of an existing highway, across such railroad shall be final, subject however to the right of appeal hereinafter given. The decision of said commission rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing of such proceeding was given, or who appeared at such hearing by counsel or in person.

This section was derived from the Railroad Law of 1890, as added by L. 1897, ch. 754, § 1, and amended by L. 1898, ch. 520, § 1. It was amended by L. 1913, ch. 744; L. 1914, ch. 378. The amendments of 1914 are shown in the footnotes.

General application.— This section applies only to new streets across existing railroads. Yonkers v. New York Cent., etc., R. Co., (1898) 32 App. Div. 474, 52 N. Y. S. 1074, affirmed (1900) 165 N. Y. 142; Op. Atty.-Gen. (1898) 166.

Retroactive operation.— The provisions of this section as to laying out a new highway do not apply to a highway duly laid out, but not constructed before the section was enacted, but such a street cannot be constructed until an order of the Public Service Commission has been obtained. New York Cent., etc., R. Co. v. Buffalo, (1908) 128 App. Div. 373, 112 N. Y. S. 997, affirmed (1910) 200 N. Y. 113, 93 N. E. 520.

Repeal of former acts.— The enactment of this section operated to repeal chapter 62 of the Laws of 1853 requiring railroads to carry highways newly laid out across their tracks without cost or expense. Matter of Waverly, (1898) 35 App. Div. 38, 54 N. Y. S. 368, affirmed in (1899) 158 N. Y. 710, 53 N. E. 1133, on authority of People v. New York Cent., etc., R. Co., (1899) 158 N. Y. 410, 53 N. E. 166.

State highway.— In improving a state highway an existing crossing cannot be changed to above or below grade without proceeding under this section. Op. Atty.-Gen. (1903) 475.

Alteration of route of street.— This section applies to an existing street which does not a cross a railroad which is so altered as to cross the same and an order of the commission is essential. Brush v. New York, etc., R. Co., (1916) 218 N. Y. 264, 112 N. E. 922, modifying 162 App. Div. 731, 148 N. Y. S. 195.

Necessity of compliance.— The provisions of this section add an additional requirement to laying out streets in cities where the same cross railroads, and the section must be complied with in all cities in addition to the other procedure for laying out streets. Matter of Ludlow St. Opening. (1902) 172 N. Y. 542, affirming 59 App. Div. 180, 68 N. Y. S. 1046. Where a railroad constructs a viaduct to carry a new street across its tracks, without an order of the commission, the same is an unlawful structure rendering it liable to a property owner for the damages thereby caused. Brush v. New York, etc., R. Co., (1916) 218 N. Y. 264, 112 N. E. 922, modifying 162 App. Div. 731, 148 N. Y. S. 195. Nor can a municipality and a railroad agree as to the manner in which a new street shall cross a railroad without an order of the Public Service Commission. Brush v. New York, etc., R. Co., (1916) 218 N. Y. 264, 112 N. E. 922, modifying 162 App. Div. 731, 148 N. Y. S. 195.

Lack of state funds.— Proceedings under this section are not defeated by the fact that there are no funds applicable to the payment of the state's share of the expense. Op. Atty.-Gen. (1904) 248.

Time of application to commission.— After a municipality has determined to lay out a street across a railroad it must apply to the Public Service Commission under this section before proceeding to acquire the necessary lands. Matter of New York, (1912) 204 N. Y. 465, 97 N. E. 862, reversing 143 App. Div. 258, 128 N. Y. S. 589, approving dictum in Matter of Ludlow St. Opening, (1902) 172 N. Y. 542, 65 N. E. 494.

[1] Words "or additional width," new.

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Permission for grade crossing.— While the Public Service Commission may permit a grade crossing, such permission should be given only in exceptional cases and where the public safety would not be materially jeopardized. Where a proposed highway would be dangerous at grade such permission need not be granted because the sole purpose of the street would be defeated by any other crossing. Matter of Town Board, etc., (1910) 138 App. Div. 412, 122 N. Y. S. 844.

Raising question of noncompliance.— The question whether this section should have been, or was, complied with cannot be reviewed on an appeal from an order confirming the report of commissioners appointed to assess the damages on laying out a street. Matter of Ludlow St. Opening, (1900) 4 App. Div. 317, 62 N. Y. S. 42.

Review of action of common council.— A determination of a common council that a new street across a railroad is necessary may be reviewed on appeal under the last sentence in section 91. Matter of Delavan Ave., (1901) 167 N. Y. 256, 60 N. E. 589; Matter of Nineteenth St., (1901) 66 App. Div. 618, 72 N. Y. S. 845, affirmed (1902) 169 N. Y. 602 mem., 170 N. Y. 576 mem.

Bridges as railway property.— Bridges across the tracks on which to carry streets, erected and paid for by the railroad, are not assessable as tangible property belonging to it. People v. Purdy, (1914) 149 N. Y. S. 315.

Taxation of bridge.—Where a structure is forced upon a railroad company solely for street purposes, its value, and even the part contributed by the company pursuant to section 94, infra, should not be assessed against it. Op. Atty.-Gen. (1915) 304.

Cited.— This section was cited in People v. Delaware, etc., Co., (1904) 177 N. Y. 337, 69 N. E. 651, affirming 81 App. Div. 335, 81 N. Y. S. 478 (see sec. 91); Matter of Colchester Town Board, etc., (1912) 151 App. Div. 946, 136 N. Y. S. 1149.

§ 91. Petition for alteration of existing crossing. The mayor and common council of any city, the president and trustees of any village, the town board of any town, the board of supervisors of any county within which a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road crosses or is crossed by a steam surface railroad at grade, below or above grade by structures heretofore constructed, or any steam surface railroad company, whose road crosses or is crossed by a street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road at grade, below or above grade, may bring their petition in writing to the public service commission, therein alleging that public safety requires an alteration in the manner of such crossing, its approaches, the method of crossing, the location of the crossing, a change in the existing structure by which such crossing is made, the closing and discontinuance of a crossing and the diversion of the travel thereon to another street, avenue, highway, road or crossing, or if not practicable to change such crossing from grade, below or above grade or to close or discontinue the same, the opening of an additional crossing for the partial diversion of travel from the grade below or above grade crossing, and praying that the same may be ordered. Where a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road in a city, village, town or county, which crosses or is crossed by a steam surface railroad at grade, below or above grade, is a part of a highway which the state commission of highways shall have determined

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to construct or improve as a state or county highway, as provided in article six of the highway law, such commission of highways may bring a petition containing any of the allegations above specified and praying for a like order. Upon any such petition being brought the public service commission shall appoint a time and place for hearing the petition, and shall give such personal notice thereof as it shall judge reasonable, of not less than ten days, however, to such petitioner, the railroad company, the municipality in which such crossing is situated, and if such crossing is in whole or part in an incorporated village having not to exceed twelve hundred inhabitants, also to the supervisor or supervisors of the town or towns in which such crossing is situated; and in all cases to the owners of the lands adjoining such crossing and adjoining that part of the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be changed in grade or location, or the land to be opened for a new crossing, and to the state commission of highways in case of a state or county highway. The public service commission shall cause notice of said hearing to be advertised in at least two newspapers published in the locality affected by the application. Upon such notice and after a hearing the public service commission shall determine what alterations or changes, if any, shall be made. If the application be made by the state commission of highways in respect to a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road proposed to be constructed or improved as a part of a state highway, the decision shall state whether such highway shall cross such railroad above or below the grade of the highway; in case of a county highway, such decision shall state whether such highway shall cross such railroad at grade, or above or below the grade of the highway. The decision of said public service commission rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person. Any person aggrieved by such decision, or by a decision made pursuant to sections eighty-nine and ninety hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated, and to the court of appeals, in the same manner and with like effect as is provided in the case of appeals from an order of the supreme court.

This section was derived from the Railroad Law of 1890, § 62, as added by L. 1897, ch. 754, § 1, and amended by L. 1898, ch. 520; L. 1899, ch. 359. It was amended to read as above by L. 1911, ch. 141; L. 1913, ch. 354; L. 1913, ch. 744; L. 1914, ch. 378, § 3.

Constitutionality.— This section, in conferring power to abolish grade crossings, is clearly constitutional. Matter of New York Cent., etc., R. Co., (1910)

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136 App. Div. 760, 121 N. Y. S. 524, modified in (1910) 200 N. Y. 121, 93 N. E. 515; Matter of Boston, etc., R. Co., (1901) 64 App. Div. 257; 72 N. Y. S. 32, affirmed (1902) 170 N. Y. 619, 63 N. E. 1115. "The legislature, either directly or through a lawful commission, can exercise authority over railroad crossings in securing public safety without violating the Federal or State Constitution." People v. Bradley, (1913) 207 N. Y. 592, 101 N. E. 766.

Application to private roads.— This section does not apply to a private way, but only to public streets. Matter of New York Cent., etc., R. Co., (1910) 200 N. Y. 121, 93 N. E. 515.

Parties to proceedings.— The only municipality which is a necessary party to proceedings under this section is the one in which the grade crossing is located. People v. Public Service Commission, (1917) 220 N. Y. 1, 114 N. E. 1050, reversing 173 App. Div. 164, 159 N. Y. S. 48.

Cause of abolition.— This section relates only to a case where public safety requires the abolition of a grade crossing and does not authorize a compulsory change on petition of a railroad where the abolition is made desirable due to a change in the grade of the railroad. People v. Delaware, etc., Co., (1904) 177 N. Y. 337, 69 N. E. 651, affirming 81 App. Div. 335, 81 N. Y. S. 478.

Power of commission, generally.— This and the subsequent sections "contemplate that the public service commission is the controlling and the determining factor in all matters relating to a change of grade, and the statute evidently intended to give it full power in the premises." People v. Public Service Commission, (1916) 173 App. Div. 164, 159 N. Y. S. 48, reversed in (1917) 220 N. Y. 1, 114 N. E. 1050.

Rehearing by commission.— The public service commission has power to grant a rehearing and modify its previous determination as to the manner of eliminating a grade crossing, and may rehear a determination by the former railroad commission. People v. Public Service Commission, (1909) 130 App. Div. 335, 114 N. Y. S. 636.

Power to substitute new highway not crossing railroad.— Section 62 of the Railroad Law of 1890, as added by L. 1897, ch. 754, which did not contain the provision for the diversion of the travel to another street, avenue, or road, did not authorize the closing of a crossing and the substitution of a new highway which would not cross the railroad. Op. Atty.-Gen. (1898) 274.

Change of route.— The public service commission may order a slight change in the route of a railroad where this is necessary and desirable in eliminating grade crossings, and may require the municipality to pay its share of the expenses of such change, where greater expense would be necessary to eliminate the crossings on the present route. Danner v. New York, etc., R. Co., (1914) 213 N. Y. 117, 106 N. E. 1029, affirming 152 App. Div. 405, 137 N. Y. S. 270; Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 756, 121 N. Y. S. 528. To abolish an existing grade crossing the public service commission may order a change in the line of the railroad and a change in the line of the highway. Danner v. New York, etc., R. Co., (1914) 213 N. Y. 117, 106 N. E. 1029, affirming 152 App. Div. 405, 137 N. Y. S. 270.

Closing streets.— The public service commission has jurisdiction to determine that in the elimination of several grade crossings by the construction of viaducts some of the crossings shall be entirely abolished and the traffic diverted to other streets on which viaducts are constructed, especially where the railroad agrees to pay all the expenses of construction and all damages to property owners. Matter of Buffalo Terminal Ry., (1907) 122 App. Div. 59, 106 N. Y. S. 655, affirmed (1908) 192 N. Y. 534, 84 N. E. 1121; Danner v. New York, etc., R. Co., (1914) 213 N. Y. 117, 106 N. E. 1029, affirming 152 App. Div. 405, 137 N. Y. S. 270, 73 Misc. 113, 130 N. Y. S. 723; Matter of Buffalo Terminal Ry., (1907) 122 App. Div. 59, 106 N. Y. S. 655, affirmed (1908) 192 N. Y. 534, 84 N. E. 1121.

Undercrossing.— The commission should not order an undercrossing where it appears that in times of average high water, constituting a portion of every year, the highway will be overflowed and impassable, no other crossing being provided, though the railroad is willing to "permit" the public to cross its lands at such times at another point at grade. Matter of Delaware, etc., R. Co., (1906) 116 App. Div. 62, 101 N. Y. S. 9.

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Rights of street railway.— The public service commission may order a change to an overhead crossing even as against a street railway occupying a highway under a grant from a turnpike company which was formerly the owner of the highway. New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624.

Order as to damages.— The public service commission has no power, under this section, to order that a town shall pay damages caused by a change of grade; no liability therefor existing by virtue of any statute. Smith v. Boston, etc., R. Co., (1904) 99 App. Div. 94, 91 N. Y. S. 412, affirmed (1905) 181 N. Y. 132.

Notice of claim.— A notice of a claim for damages caused by a change in the grade of a street in abolishing a grade crossing under this section must be filed as provided in subd. 9 of section 94. Melenbacker v. Salamanca, (1907) 188 N. Y. 370, 80 N. E. 1090, affirming 116 App. Div. 691, 101 N. Y. S. 1073.

Petition.— An objection that the petition of a town does not allege that the crossing sought to be abolished is in the town cannot be raised for the first time on appeal. Schaghticoke Town Board v. Fitchburg R. Co., (1900) 53 App. Div. 16, 65 N. Y. S. 498, affirmed (1902) 169 N. Y. 609, 62 N. E. 1101.

Notice of hearing.— An objection that the notice given of the hearing before the commission was not timely cannot be raised for the first time on appeal where the parties appeared and contested the application. Schaghticoke Town Board v. Fitchburg R. Co., (1900) 53 App. Div. 16, 65 N. Y. S. 498, affirmed (1902) 169 N. Y. 609, 62 N. E. 1101.

Appeal from intermediate order.— Where the commission has ordered a crossing above grade on a viaduct the specifications for which are to be subsequently presented and approved when a final order will be made, an appeal from the first order is premature as it is not a final determination. Matter of Town Board, etc., (1910) 138 App. Div. 412, 122 N. Y. S. 844.

Certiorari.— It seems that an appeal under this section is the only permissible method of review, and that certiorari will not lie. Matter of Rusk, (1914) 164 App. Div. 917, 149 N. Y. S. 1109, affirmed (1915) 213 N. Y. 701 mem.

Review of action of common council.— The last sentence in this section authorizes an appeal from the determination of a common council, under section 90, that a new street is necessary. Matter of Nineteenth St., (1901) 66 App. Div. 618, 72 N. Y. S. 845, affirmed (1902) 169 N. Y. 602 mem., 170 N. Y. 576. mem.; Matter of Delaven Ave., (1901) 167 N. Y. 256, 60 N. E. 589. A doubt had previously been expressed on the question in Matter of North Third Ave., (1898) 30 App. Div. 256, 51 N. Y. S. 353. But to obtain a review of the action of municipal authorities in laying out a street the railroad must present proof by affidavit of facts showing the impropriety of a new crossing and a motion for a reference to take proof as to the circumstances is improper. Matter of North Third Ave., (1898) 30 App. Div. 256, 51 N. Y. S. 353. Where the action of a common council in laying out a new street across a railroad is sought to be reviewed the return should show all information before the common council, either from its own observation or reports of committees. In re Delavan Ave., (1901) 62 App. Div. 492, 71 N. Y. S. 137.

Weight given opinion of commission.— On a review of the finding of the public service commission its opinion is entitled to great weight, and should not be reversed unless it is clearly made to appear that it was founded on erroneous legal principles or was contrary to the clear weight of the evidence. Matter of Boston, etc., R. Co., (1901) 64 App. Div. 257, 72 N. Y. S. 32, affirmed (1902) 170 N. Y. 619, 63 N. E. 1115; Schaghticoke Town Board v. Fitchburg R. Co., (1900) 53 App. Div. 16, 65 N. Y. S. 498, affirmed (1902) 169 N. Y. 609, 62 N. E. 1101.

Cited.—This section was cited in People v. Dawson, (1914) 87 Misc. 588, 150 N. Y. S. 679 (see sec. 92); Long Island R. Co. v. Sherwood, (1912) 136 N. Y. S. 752.

§ 92. Acquisition of land, right or easement in crossing. The municipal corporation having jurisdiction over the street, avenue, highway or road and in which the crossing is located,

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or the state commission of highways in case of a street, avenue, highway or road to be constructed or improved as a part of a state or county highway, may with the approval of the railroad company acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter, but if unable to do so shall acquire such lands, rights or easements by condemnation either under the condemnation law or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein.

This section was derived from the Railroad Law of 1890, § 63, as added by L. 1897, ch. 754, and amended by L. 1899, ch. 226. It was amended to read as above by L. 1913, ch. 744, the change consisting in adding the words "having jurisdiction over the street, avenue, highway or road and."

Condemnation proceedings: see Code Civ. Pro., § 3357 et seq.

Municipality referred to.— The municipality referred to in this section is the one which is a necessary party to the proceedings, i. e., the one in which the crossing is located. People v. Public Service Commission, (1917) 220 N. Y. 1, 114 N. E. 1050, reversing 173 App. Div. 164, 159 N. Y. S. 48.

Proceedings by county.— The words "municipal corporation" are broad enough to include a county, so that a county may acquire the lands necessary to change the grade of a county road. Nassau County v. Luessen, (1910) 69 Misc. 184, 125 N. Y. S. 206.

State highway.— The state highway commission has power to enter into negotiations for lands necessary in eliminating a crossing under its jurisdiction and to institute condemnation proceedings. Op. Atty.-Gen. (1911) 290.

Cause of damages.— This section is sufficiently broad to require that compensation be made to an abutting owner injured by a change of grade for damages occasioned during the progress of the work not due to the negligence of the contractor but arising from the nature of the work itself, as well as damages due to interruption of use due to interference with access, except loss of profits. Corning v. Holmes, (1916) 96 Misc. 567, 160 N. Y. S. 847.

Liability of town for change of grade.— It has been held that this section does not subject a town to liability for damages caused an abutter by a change of grade outside of an incorporated village or city. Smith v. Boston etc., R. Co., (1904) 99 App. Div. 94, 91 N. Y. S. 412, affirmed (1905) 181 N. Y. 132. In Smith v. Boston, etc., R. Co., (1905) 181 N. Y. 132, 73 N. E. 679, affirming 99 App. Div. 94, 91 N. Y. S. 412, it was held that an abutting owner could not maintain an action against a town for damages caused by a change of grade under an order of the commission. Two of the seven judges declined to express an opinion on the question whether such damages could be recovered in any manner. Three judges held that such damages might be recovered in condemnation proceedings which the property owner could, through mandamus, compel to be instituted, and two other judges seem to have favored this view though declining to express an absolute opinion.

Village.—A property owner in a village who is damaged by a change of grade cannot proceed under the Village Law to have his damages assessed. Torge v. Salamanca, (1903) 176 N. Y. 324, reversing, (1903) 86 App. Div. 211, 83 N. Y. S. 672.

Change of grade of state highway.— Where the elimination of a grade crossing necessitates the change of grade of a state highway, there is no liability for the damages caused by the change of grade. People v. Dawson, (1914) 87 Misc. 588, 150 N. Y. S. 679.

Compelling institution of proceedings.— Where the construction of a viaduct cuts off the access of an abutting owner he is entitled to have proceedings commenced under this section to condemn his easement and may compel the institution thereof by mandamus. People v. Hamburg Town Board, (1908) 58 Misc. 643, 109 N. Y. S. 913. But mandamus will not lie to compel the

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audit of a claim for damages caused by the closing of a highway. Jones v. Fonda, (1903) 85 App. Div. 265, 83 N. Y. S. 1012.

Cited.— This section was cited in People v. Bradley, (1913) 207 N. Y. 592, 101 N. E. 766; New Paltz, etc., Traction Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624 (see sec. 91).

§ 93. Repair of bridges and subways at crossings. When a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated; except that in the case of any overhead bridge constructed prior to the first day of July, eighteen hundred and ninety-seven, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligation shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the town superintendent of highways or other duly constituted authority, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated. In case such highway is a part of a state or county highway constructed or improved as provided in article six of the highway law, the roadway over such railroad or the subway underneath the same, and the approaches thereto, shall be maintained and kept in repair under the supervision and control of the state commission of highways in the manner provided by the highway law for the maintenance and repair of state and county highways where such roadway, subway or approaches, or any of them, have been constructed or improved as a part of a state or a county highway.

This section was derived from the Railroad Law of 1890, § 64, as added by L. 1897, ch. 754, and amended by L. 1902, ch. 140; L. 1909, ch. 153. After its incorporation in the Consolidated Laws it was further amended by L. 1913, ch. 744; L. 1916, ch. 484. The amendment of 1913 inserted the words "having jurisdiction over and" in the first sentence. The amendment of 1916 added the words at the end beginning with "where such roadway" etc.

Repeal.— The provision of this section imposing the duty of repairing an undercrossing on the municipality was not repealed by L. 1899, ch. 517, sec. 12. New York, etc., R. Co. v. Port Chester, (1912) 149 App. Div. 893, 134 N. Y. S. 883, affirmed (1914) 210 N. Y. 600 mem.

Bridges within section.—The duty imposed on a railroad under this section as to overhead crossings exists as to crossings constructed before the enactment of the section. Yonkers v. New York Cent., etc., R. Co., (1900) 165 N. Y. 142, 58 N. E. 877, affirming 32 App. Div. 474, 52 N. Y. S. 1074. Where, prior to January 1, 1897, there existed a bridge which a railroad was obliged to keep in repair, this duty continues as to a new bridge erected by it at

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another place as a substitute, the new bridge and new location being necessitated by improvements made by it. Cortlandt v. New York Cent. R. Co., (1916) 175 App. Div. 194, 161 N. Y. S. 377. This section, which became a law on May 22, 1897, throws the burden of maintenance as therein provided on a railroad over which bridges were constructed under L. 1897, ch. 645, relating to certain streets in New York city, which became a law on the same day, though the latter act provides that the said bridges shall be kept in repair by a city officer. New York v. New York Cent., etc., R. Co., (1915) 168 App. Div. 6, 153 N. Y. S. 747. In order to throw the burden of maintaining a bridge on a railroad it is not enough to show that it was built prior to January 1, 1897, its original obligation being merely to maintain bridges made necessary by its interference with the highway, but it must be shown that the original obligation was on it. Cortlandt v. New York Cent. R. Co., (1916) 175 App. Div. 194, 161 N. Y. S. 377.

Bridge as tangible property of railroad.— A bridge which a railroad is bound to maintain under this section is not a part of its tangible property to be included in assessing a franchise tax, as the bridge is not its property, but a part of the street. People v. State Board of Tax Com'rs, (1915) 215 N. Y. 434, 109 N. E. 547, L. R. A. 1916B 1225, reversing 166 App. Div. 632, 152 N. Y. 263; Op. Atty.-Gen. (1915) 304.

Relative duties of state and railroad as to bridges.— A railroad bridge and its abutments constructed for an overhead crossing of the railroad by a state or county highway are to be built and maintained by the railroad, but the roadway thereover and the approaches thereto are to be maintained and kept in repair by the state. Op. Atty.-Gen. (1916) 96, 6 St. Dept. Rep. 468.

State highway.— In case of a bridge on a state highway the railroad bears its usual burden and the state takes the place of the municipality. Op. Atty.-Gen. (1912) 233.

Dangerous approach.— The fact that an approach to a bridge maintained by a railroad is steep and dangerous does not authorize proceedings for altering the height of the structure where the municipality is bound to repair the approaches and could thereby avoid the danger. Op. Atty.-Gen. (1906) 470.

Notice of defect.— In the case of a bridge erected prior to July 1, 1897, no recovery can be had against a railroad for injuries suffered by defective planking where no notice had been given as required. Murphy v. Delaware, etc., Co., (1912) 151 App. Div. 351, 135 N. Y. S. 509.

Bridge in village.— An overhead bridge in a highway is a public bridge and where the village in which it was located never assumed control over it, the town is the "municipality" charged with its control and maintenance, under section 142 of the General Village Law, and the village is not liable for a defect therein. Murphy v. Ft. Edward, (1913) 79 Misc. 296, 140 N. Y. S. 885.

Cited.—This section was cited in Corning v. New York Cent., etc., R. Co., (1912) 153 App. Div. 938, 138 N. Y. S. 1111, affirmed (1915) 214 N. Y. 644 mem.; Op. Atty.-Gen. (1910) 677.

§ 94. Expense of constructing new crossings. 1. Whenever under the provisions of section eighty-nine of this chapter, a new railroad is constructed across an existing highway, the expense of crossing above or below the grade of the highway including any expense incurred in altering or changing the highway under a determination of the public service commission shall be paid entirely by the railroad corporation.

2. Whenever under the provisions of section ninety of this chapter a new street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation having jurisdiction over such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall pay the

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remaining one-half of the expense of making such crossing above or below the grade of the railroad.

3. Whenever a change is made as to an existing crossing or structure in accordance with the provisions of section ninety-one of this chapter, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation and twenty-five per centum by the state; except that whenever an existing crossing, in which a change is made under the provisions of section ninety-one, is located wholly or partly within an incorporated village having not to exceed twelve hundred inhabitants, the portion of expense herein required to be borne by the municipal corporation shall be borne by the town or towns in which such crossing is situated.

4. Whenever under the provisions of sections ninety and ninety-one of this chapter a highway is constructed across an existing railroad and is a part of a state or county highway constructed or improved as provided in the highway law, one-half of the expense of making such crossing above or below grade or changing or rebuilding the existing structure by which such crossing is made, shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the state in the case of a state highway, and jointly by the state, county and town in the case of a county highway, in the same proportion and in the same manner as the cost of construction or improvement of such state or county highway is paid.

5. Whenever in carrying out the provisions of sections ninety or ninety-one of this chapter two or more lines of steam surface railroad, owned and operated by different corporations, cross a highway at a point where a change in grade is made, each corporation shall pay such proportion of fifty per centum of the expense thereof as shall be determined by the public service commission.

6. In carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision and approval of the public service commission; and in all cases, except where the entire expense is paid by the railroad corporation, the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements shall be paid primarily by the municipal corporation having jurisdiction over the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road or, in case of a state or county highway, upon the order of the state commission of highways out of moneys available therefor. Plans and specifications of all changes proposed under sections ninety and ninety-one of this chapter and an estimate of the expense thereof shall be submitted to the public service commission for its approval before

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the letting of any contract. If such changes are proposed in a highway which is to be constructed or improved as a state or county highway, such plans and specifications shall also be submitted to the state commission of highways for its approval before the letting of any contract. In case the work is done by contract the proposals of contractors shall be submitted to the public service commission, and if the commission shall determine that the bids are excessive it shall have the power to require the submission of new proposals. The commission may employ temporarily such experts and engineers as may be necessary properly to supervise any work that may be undertaken under sections eighty-nine, ninety and ninety-one of this chapter, the expense thereof to be paid by the comptroller upon the requisition and certificate of the commission and included in the cost of the particular change in grade or in the structure above or below grade on account of which it is incurred and finally apportioned in the manner provided in this section.

7. Upon the completion of the work and its approval by the public service commission an accounting shall be had between the railroad corporation and the municipal corporation or the state commission of highways of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation or the state commission of highways has expended more than its proportion of the expense of the crossing as herein provided a settlement shall be forthwith made in accordance with the provisions of this section. At any time after the work of elimination of a crossing has been commenced the public service commission may, upon its own motion or upon the petition of the railroad company or of any municipality interested or of the state commission of highways, make an order for an intermediate settlement and direct payments to be made in connection therewith as in this section provided for a final accounting. All items of expenditure shall be verified under oath, and in case of a dispute between the railroad corporation and the municipal corporation or the state commission of highways as to the amount expended, any judge of the supreme court in the judicial district in which the municipality or the state or county highway is situated may appoint a referee to take testimony as to the amount expended, and the confirmation of the report of the referee shall be final. In the event of the failure or refusal of the railroad corporation to pay its proportion of the expense, the same with interest from the date of such accounting may be levied and assessed upon the railroad corporation and collected in the same manner that taxes and assessments are now collected by the municipal corporation within which the work is done; and in the event of the failure or refusal of the municipal corporation to pay its proportion of the expense an action may be maintained by the railroad corporation for the collection of the same with

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interest from the date of such accounting, or the railroad corporation may offset such amount with interest against any taxes levied or assessed against it or its property by such municipal corporation.

8. In the event of the appropriation made by the state in any one year being insufficient to pay the state's proportion of the expense of any change that may be ordered the first payment from the appropriation of the succeeding year shall be on account of said change, and no payment shall be made on account of any subsequent change that may be ordered, nor shall any subsequent change be ordered, until the obligation of the state on account of the first named change in grade has been fully discharged, unless the same shall be provided for by an additional appropriation to be made by the legislature. The state's proportion of the expense of changing any existing grade crossing or the structure of any existing crossing above or below grade shall be paid by the state treasurer on the warrant of the comptroller, to which shall be appended the certificate of the public service commission to the effect that the work has been properly performed and a statement showing the situation of the crossing or structure that has been changed, the total cost and the proportionate expense thereof; and the money shall be paid in whole or in part to the railroad corporation or to the municipal corporation as the public service commission may direct, subject, however, to the rights of the respective parties as they appear from the accounting or intermediate accounting to be had as hereinbefore provided for.

9. No claim for damages to property on account of the change or elimination of any crossing or change in structure under the provisions of this article shall be allowed unless notice of such claim is filed with the public service commission within six months after completion of the work necessary for such change or elimination.

This section was derived from the Railroad Law of 1890, § 65, as added by L. 1897, ch. 754, and amended by L. 1900, ch. 517; L. 1909, ch. 153. After its incorporation into the Consolidated Laws it was further amended by L. 1911, ch. 141; L. 1913, ch. 354; L. 1913, ch. 425; L. 1913, ch. 744; L. 1914, ch. 378; L. 1915, ch. 240.

Validity of requirement that railroad shall construct and maintain crossings at new highways without compensation: see 8 Ann. Cas. 1056, note; 20 Ann. Cas. 1208, note.

Constitutionality.—The provision requiring municipalities to pay a portion of the expense of eliminating grade crossings is not unconstitutional. Matter of New York Cent., etc., R. Co., (1910) 136 App. Div. 760, 121 N. Y. S. 524, modified in (1910) 200 N. Y. 121, 93 N. E. 515. Municipal contribution to the elimination of a grade crossing is not objectionable as a gift to the railroad. Long Island R. Co. v. Sherwood, (1912) 136 N. Y. S. 752. The provision as to payment by the state in case of a state highway is constitutional. Op. Atty.-Gen. (1911) 290.

Time of payment.— While there might be no legal objection to the state paying its proportion of the cost of the construction of the new crossing when the work is completed and approved by the public service commission, yet under the reading of the last sentence of this section, it would seem to be the

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better practice, except perhaps in exceptional cases, to comply strictly with the prescribed procedure. Op. Atty.-Gen. (1899) 147.

Expense of acquiring land.— In a case arising under section 91, supra, the state should contribute to the total cost of the crossing, including the expense involved in the acquisition of lands, easements, etc. Op. Atty.-Gen. (1899) 147.

Contribution to change of route.— A municipality may be compelled to contribute to the expense of a change in the route of a railroad made necessary by the elimination of grade crossings where the resultant expense is less than would be incurred by eliminating the crossings on the present route. Matter of New York, etc., R. Co., (1910) 136 App. Div. 756, 121 N. Y. S. 528.

Towns liable.— Where a grade crossing in one town is eliminated by the construction of a viaduct the approach to which is in another town the latter is not bound to contribute to the cost of the approach but the town's share falls on the town in which the grade crossing was located. People v. Public Service Commission, (1917) 220 N. Y. 1, 114 N. E. 1050, reversing 173 App. Div. 164, 159 N. Y. S. 48.

Duties of state engineer.— The state engineer has no duty to perform in connection with a change of crossing on a state highway. Op. Atty.-Gen. (1904) 329.

Approach on private property.— Under this section the state commissioner of highways should not approve a plan for an undercrossing calling for approaches on private property. Op. Atty.-Gen. (1911) 242.

Accounting.— The accounting contemplated by this section is not merely as to the amounts expended, but the apportionment of the expense between the interested parties, which is to be made by the commission. People v. Public Service Commission, (1916) 173 App. Div. 164, 159 N. Y. S. 48, but see this case in (1917) 220 N. Y. 1.

Necessity of appropriation.— Op. Atty.-Gen. (1904) 248, to the effect that proceedings might be had though no appropriation had been made, was quoted in Kirby v. State, (1910) 68 Misc. 626, 125 N. Y. S. 742.

Ownership of structure.— A railroad does not become the owner of a structure to whose construction it contributes under this section, but the same becomes a part of the street. People v. State Board of Tax Com'rs, (1915) 215 N. Y. 434, 109 N. E. 547, L. R. A. 1916B 1225, reversing 166 App. Div. 632, 152 N. Y. S. 263.

Claims for damages.— Unless an owner files his claim for damages caused by a change of grade, as provided in subdivision 9, he has no remedy. Melenbacker v. Salamanca, (1907) 188 N. Y. 370, 80 N. E. 1090, affirming 116 App. Div. 691, 101 N. Y. S. 1073.

Cited.—This section was cited in People v. Bradley, (1913) 207 N. Y. 592, 101 N. E. 766; Corning v. Holmes, (1916) 96 Misc. 567, 160 N. Y. S. 847 (see sec. 92); New Paltz, etc., R. Co. v. Central New England R. Co., (1914) 84 Misc. 528, 147 N. Y. S. 624 (see sec. 91); Op. Atty.-Gen. (1915) 13.

§ 95. Proceedings by public service commission for alteration of grade crossings. The public service commission may, in the absence of any application therefor, when in its opinion public safety requires an alteration in an existing grade crossing or a change in any existing structure above or below grade,[1] institute proceedings on its own motion for an alteration in such grade crossing or structure,[2] upon such notice as it shall deem reasonable, of not less than ten days however, to the railroad company, the municipal corporation and the person or persons interested, and proceedings shall be conducted as provided in section ninety-one of this chapter. The changes in existing grade crossings or

[1] Words "or a change in any existing structure above or below grade," new.

[2] Words "or structure" new.

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structures[3] authorized or required by the commission in any one year shall be so distributed and apportioned over and among the railroads and the municipalities of the state as to produce such equality of burden upon them for their proportionate part of the expenses as herein provided for as the nature and circumstances of the cases before it will permit.

This section was derived from the Railroad Law of 1890, § 66 as added by L. 1897, ch. 754. It was amended by L. 1913, ch. 354. The amendments of 1913 are shown in the footnotes.

Cited.— This section was cited in Matter of Town Board, etc., (1910) 138 App. Div. 412, 122 N. Y. S. 844 (see section 90).

§ 96. Proceedings to enforce orders of commission. It shall be the duty of the corporation, municipality or person or persons to whom the decisions or orders of the public service commission are directed, as provided in sections eighty-nine, ninety, ninety-one and ninety-five of this chapter, to comply with such decisions and orders, and in case of their failure so to do the commission shall thereupon take proceedings to compel obedience to the decisions and orders of the commission. The supreme court at a special term shall have the power in all cases of such decisions and orders by the public service commission to compel compliance therewith by mandamus, or under the provisions of the public service commissions law, subject to appeal to the appellate division of the supreme court and the court of appeals in the same manner and with like effect as is provided in case of appeals from an order of the supreme court.

This section was derived from the Railroad Law of 1890, § 67, as added by L. 1897, ch. 754.

Unlawful acts and neglect of duty by railroad officials in relation to public service commissions: see PENAL LAW, § 1980.

§ 97. Municipal corporation may borrow money. Whenever in carrying out any of the provisions of sections eighty-nine to ninety-six inclusive of this chapter any municipality shall incur any expense or become liable for the payment of any moneys, it shall be lawful for such municipality temporarily to borrow such money on the notes or certificates of such municipality, and to include the amount of outstanding notes or certificates, or any part thereof, in its next annual tax levy for municipal purposes, or in the discretion of the common council in case of a city, the board of trustees in case of a village, the town board in case of a town, or the board of supervisors in the case of a county, to borrow the same, or any part thereof, on the credit of the municipality, and to issue bonds therefor, which bonds shall be signed by the mayor and clerk in case of a city, the president and clerk in case of a village, the town board in case of a town and the board of supervisors in the case of a county, and shall be in such

[3] Words "or structures" new.

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form and for such sums and be payable at such times and places with interest not exceeding five per centum per annum, as the common council in case of a city, the board of trustees in case of a village, the town board in case of a town and the board of supervisors in the case of a county, shall direct.

This section was derived from the Railroad Law of 1890, § 67a as added by L. 1899, ch. 541, and amended by L. 1902, ch. 198. It was amended by L. 1913, ch. 744; L. 1914, ch. 498. The amendment of 1913 added the provisions relating to boards of supervisors, and the material change made by the amendment of 1914 was the substituting of "five" for "four."

L. 1914, ch. 498, also repealed L. 1910, ch. 20, which amended the former railroad law of 1890, § 67a. Section 67a as re-enacted § 97 of the Consolidated Railroad Law (L. 1910, ch. 481), did not contain the amendment affected by said L. 1910, ch. 20, but said ch. 20 remained in force.

Municipal railroad aid bonds: see GENERAL MUNICIPAL LAW, § 220 et seq.

Cited.—This section was cited in Smith v. Boston, etc., R. Co., (1904) 99 App. Div. 94, 91 N. Y. S. 412 (per Houghton J., dissenting; see sec. 91), affirmed (1905) 181 N. Y. 132.

§ 98. Intersections of railroads. All steam railroads hereafter constructed across the tracks of any other railroad and any street surface railroad hereafter constructed across a steam railroad shall be above, below, or at grade of such existing railroad as the public service commission shall determine, and such commission shall in such determination fix the proportion of expense of such crossing to be paid by each railroad.

This section was derived from the Railroad Law of 1890 as added by L. 1897, ch. 754 and amended by L. 1900, ch. 739.

Duty of railroad company to block rails at crossing: see Ann. Cas. 1913C 1265, note.

Right of railroad company to condemn right of way over or across tracks of another company for a spur track to private establishments: see 5 L. R. A. (N. S.) 512, note.

Purpose of section.— The apparent intention of the legislature in enacting this section was to avoid whenever practical a street railroad crossing over a railroad at grade; but the matter was left to the determination of the commissioners on the facts of each case. Op. Atty.-Gen. (1898) 240.

Laying additional track.— The laying of an additional track by a double-track railroad which is crossed by another railroad is not within this section. Buffalo Creek R. Co. v. New York Cent. R. Co., (1916) 96 Misc. 462, 160 N. Y. S. 546.

Effect on section 22.— This section does not repeal the provisions of section 22, infra, in so far as they authorize the condemnation of a right of crossing, as the commission merely determines the kind of permanent crossing which shall be constructed and the person to bear the expense thereof. Oneonta, etc., R. Co. v. Cooperstown, etc., R. Co., (1903) 85 App. Div. 284, 83 N. Y. S. 307.

Power of commission.— There is no doubt that this section has conferred on the commission power to determine how the crossing of one road by another shall be made, and how the expenses in connection therewith shall be borne. Delaware, etc., R. Co. v. Syracuse, etc., R. Co., (1899) 28 Misc. 456, 59 N. Y. S. 1035, affirmed 43 App. Div. 621, 60 N. Y. S. 386.

Cited.—This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64). Where, on motion, one of the railways is made a party to sustain a decision of the commission under this section in certiorari proceedings, if it fails to appear or file a brief the determination will be reversed. People v. Board of Com'rs, (1901) 66 App. Div. 615 mem., 72 N. Y. S. 1013.

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§ 99. Application of foregoing sections. The provisions of sections eighty-nine to ninety-eight inclusive of this chapter shall also apply to all steam surface railroads existing on the first day of July, eighteen hundred and ninety-seven, or thereafter, on which, after said date, electricity or some other agency than steam shall be substituted as a motive power. None of the provisions of said sections shall apply to crossings in the city of Buffalo under the jurisdiction of the grade crossing commissioners of that city.[1] The terms "municipality" and "municipal corporation" as used in said sections shall include cities, villages, towns and counties.

This section was derived from the Railroad Law of 1890 as added by L. 1897, ch. 754, with L. 1897, ch. 754, § 2, incorporated. It was amended by L. 1913, ch. 744; L. 1915, ch. 613. The amendment of 1913 added the last sentence. The amendment of 1914 made the change shown in the footnote.

Crossings in city of Buffalo.— The grade crossing commissioners of the city of Buffalo have jurisdiction over only the crossings which are embraced within the general plan adopted by them pursuant to L. 1888, ch. 345, as amended by L. 1890, ch. 255, and L. 1892, ch. 353. All other crossings in such city are within the jurisdiction of the public service commission. Op. Atty.-Gen. (1898) 200.

Cited.— This section was cited in People v. Bradley, (1913) 207 N. Y. 592, 101 N. E. 766; Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 100. Temporary leave granted by court to a street surface railroad; bond. Whenever the railroad or route of any street surface railroad corporation shall intersect and cross, or shall cross the tracks and roadbed of any railroad, operated by locomotive, steam or other power, which are laid in, across or upon the surface of any street, avenue, road or highway in any city, town or village of the state, having less than five hundred thousand inhabitants and such street surface railroad corporation having been unable to agree with the corporation owning the tracks and roadbed so intersected or to be intersected and crossed, as to the line or lines, grade or grades, points or manner of such intersection and crossing, or upon the compensation to be made therefor, shall have applied to the court by petition to appoint commissioners to determine the same, the court shall upon application made by such street surface railroad corporation, at, or after, the time of the appointment of such commissioners, or if an answer to the petition of such street surface railroad corporation has been interposed, at any time thereafter, direct that such street surface railroad corporation be permitted to lay its tracks across, and to intersect, upon the surface of the street, avenue, road or highway, the tracks and roadbed of such railroad operated by locomotive steam or other power, provided such street surface railroad corporation shall at the time of obtaining such order,

[1] Words "nor shall they apply to the University avenue or Brown street crossing in the city of Rochester," omitted.

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make and file with the clerk of said court, its bond or undertaking in writing, in an amount and with surety or sureties to be approved by the court, conditioned for the full and faithful performance by such street surface railroad corporation of any and all conditions and requirements which may be imposed by said commissioners and be affirmed by the court, in determining the line or lines, grade or grades, points or manner of such intersection and crossing and as to the amount of compensation to be paid therefor, and also conditioned to conform such crossing and intersection made by virtue of such order of the court to the requirements made by said commissioners as affirmed by the court.

This section was derived from L. 1893, ch. 239.
Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 101. Consent of public service commission in certain cases. No street surface railroad shall be allowed to lay its tracks at grade across the tracks or roadbed of any railroad operated by locomotive steam power at any point where there are three or more tracks of the steam road proposed to be crossed, which tracks have been constructed and in operation at least two years, unless the written consent of the public service commission be first obtained for such crossing at grade. But this section shall not affect the operation of the preceding section in any suit or proceeding pending on the twenty-ninth day of March, eighteen hundred and ninety-three, nor any renewals of said pending suit or proceeding brought for any cause.

This section was derived from L. 1893, ch. 239, § 2.
Cited.— This section was cited in Kent v. Jamestown St. R. Co., (1912) 205 N. Y. 361, 98 N. E. 664 (see sec. 64).

§ 102. Ventilation of tunnels. The public service commission is hereby authorized, empowered and given full and complete authority to require and compel all tunnels used or to be used by railroads operated by steam in this state to be properly ventilated, in such manner and by such means and mechanical appliances as said commission may direct.

This section was derived from L. 1891, ch. 360, § 1.
Tunnel railroads: see supra, § 28.

§ 103. Lighting of tunnels. The public service commission is also hereby authorized, empowered and given full and complete authority to require and compel all tunnels used or to be used by railroads operated by steam in this state, to be properly lighted by electricity or otherwise, or by such means or in such manner as said commission may direct.

This section was derived from L. 1891, ch. 360, § 2.
Tunnel railroads: see supra, § 28.

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§ 104. Compliance with orders of commission. Whenever the public service commission shall cause to be personally served upon any railroad corporation controlling any tunnel or part of a tunnel in this state for the purpose of operating a railroad or moving, hauling or propelling cars therein by steam, by delivering a copy personally to the president, general manager or any director of said corporation of a notice or order of said commission, stating and specifying the structures to be erected, the manner, means, mechanical appliances and apparatus to be used in lighting or ventilating any tunnel or tunnels used by said corporation for the purpose of moving, hauling or propelling cars by steam therein as aforesaid, said corporation shall, within thirty days from and after the service of said notice or order as aforesaid, cause said tunnel or tunnels so used by it as aforesaid to be lighted or ventilated, or both, in the manner and by the means and use of the mechanical apparatus and appliances specified and pointed out in said notice or order.

This section was derived from L. 1891, ch. 360, § 3.

Former provisions.— Former section 104 is now incorporated in subdivision 7 of section 49 of the Public Service Commissions Law. See Oatman v. International R. Co., (1917) 163 N. Y. S. 495.

§ 105. Mandamus. After the expiration of thirty days from the service of said order or notice specified in the preceding section, as therein directed, if said corporation shall not have fully complied with the provisions and requirements of said notice or order as aforesaid and as therein directed and required, the public service commission may apply hereunder, or under the provisions of the public service commissions law, to the supreme court of this state for a writ of mandamus to compel said corporation or corporations so neglecting or refusing to obey and comply with the provisions of said order or notice to comply with and obey the provisions and requirements of said notice or order, and said court shall have full power and authority to hear and determine said matter, and, after giving the corporation or corporations proceeded against an opportunity to be heard in its or their defense, to compel said corporation or corporations so proceeded against to obey said order or notice, and forthwith comply with and carry out the provisions and requirements therein contained.

This section was derived from L. 1891, ch. 360, § 4.

§ 106. Penalty for violation. Every corporation violating any of the provisions of the preceding four sections shall be guilty of a misdemeanor and may be indicted therefor, and may be compelled to appear and plead to an indictment therefor in the person of its president, secretary, treasurer or any director thereof, and a bench warrant may issue out of any competent court to compel such attendance and pleading, and, upon conviction thereof, such

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corporations shall be punished by a fine of one thousand dollars, and an additional fine of five hundred dollars a day for each and every day or part of a day after thirty days from the due service of said notice or order that said corporation shall refuse or neglect to obey and carry out the requirements and provisions of the same, and duly sentenced to pay the same.

This section was derived from L. 1891, ch. 360, § 5.

§ 107. **Judgment-roll.** It shall be the duty of the district attorney prosecuting any corporation for a violation of any of the provisions of sections one hundred and three, one hundred and four and one hundred and five, that shall be convicted thereof and sentenced to pay a fine therefor, to cause a judgment-roll to be made up, consisting of the indictment, orders and sentence of the court and a formal judgment, to be prepared by him, which judgment shall be duly signed by the clerk of the county in which said trial took place; said judgment-roll shall be filed by said county clerk and said judgment shall be duly recorded in the book of judgments in said county and duly entered and docketed by said county clerk in said county the same as if said judgment had been obtained in a civil action, and said judgment so duly entered and docketed shall become and be a lien upon all of the real estate of said corporation against which the same is obtained, and the collection thereof may be enforced by execution to be issued and signed by the district attorney of the county where the trial of said indictment took place, in the same manner and to the same extent as executions are collected in civil actions.

This section was derived from L. 1891, ch. 360, § 6.

§ 108. **Approval of appliances in cities having a population of one million inhabitants or over.** In cities in this state having a population of one million inhabitants or over, where tunnels are or may hereafter be operated or controlled by any railroad corporation, such portions of any mechanical or other devices or appliances as may be required under the provisions of the preceding six sections to be constructed on or above the surface of any streets, avenues or other places under which such tunnels may be built, shall be subject as to form, material and construction, to the approval of the local authorities of such cities, except that in the city of New York such approval shall be by a majority vote of the mayor, the comptroller, the president of the department of public parks of said city and the president of the borough of said city in which such mechanical or other device or appliance is to be constructed.

This section was derived from L. 1891, ch. 360, § 7.
Tunnel railroads: see supra, § 28.

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ARTICLE 4

Consolidation, Lease, Sale and Reorganization

Section 140. Consolidation of corporations owning continuous lines; abandonment of parallel lines.
141. Conditions.
142. New corporation.
143. Creditors' rights not to be impaired.
144. Assessment of property of new corporation.
145. Stocks of municipal corporations, how represented.
146. Foreclosure of mortgages made by consolidated railroads partly in the state.
147. Powers of corporations organized to acquire and operate railroads partly in the state.
148. Lease of road.
149. Lessees of railroad may acquire stock therein.
150. Consolidation and lease of parallel lines prohibited.
151. Mortgagee may purchase at foreclosure sale.
152. Certificates of stock may be issued after foreclosure in certain cases.
153. Liabilities of reorganized railroad corporations.
154. Foreign railroads.
155. Consolidation of domestic and foreign railroads.
*[156–159. Merger of business and railroad corporations.]

§ 140. Consolidation of corporations owning continuous lines; abandonment of parallel lines. 1. Subject to the permission and approval of the public service commission, any railroad or other corporation, organized under the laws of this state, or of this state and any other state, and owning or operating a railroad, bridge or tunnel, either wholly within or partly within and partly without the state, or whose lines or routes of road have been located but not constructed, may merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad, tunnel or bridge corporation or corporations organized under the laws of this state or of this state and any other state, or under the laws of any other state or states, whenever the two or more railroads of the companies or corporations so to be consolidated, tunnels, bridges or branches or any part thereof, or the line or routes of their road, if not constructed, shall or may form a continuous or connected line of railroad with each other or by means of any intervening railroad bridge, tunnel or ferry, [1]or by means of a right to operate cars

*Added as paragraphs without headings by L. 1917, ch. 771.
[1] Words "or by means of a right to operate cars . . . second district" added.

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over any intervening railroad subject to the jurisdiction of the public service commission, second district, and any such consolidated corporation may thereupon construct or finish the construction of such continuous line of railroad, if not previously constructed, and operate the same, subject to all provisions of law applicable to such railroad corporations. Where the road to be operated is in whole or in part a tunnel or sub-surface road, authorized by section twenty-eight of this chapter, its consolidation with another road or roads under the provisions of this section shall not prevent any connecting railroad from having equal rights of transit for its passengers and freight through or over the tunnel or bridge of any such road, upon the same equitable terms, nor shall such consolidation be made where such tunnel or sub-surface road exceeds five miles in length.

2. Any railroad corporation, which by consolidation or merger under any provision of law, now owns, or shall hereafter own parallel or substantially parallel lines of railroad between any two points or stations, shall have the right, upon obtaining the consent of the public service commission of the proper district, to abandon such portion of its railroad and its franchise to own, maintain and operate the same on either of the said parallel lines, as shall, in the opinion of the said public service commission, be no longer necessary to furnish proper and adequate service to the public in the transportaion of passengers and freight within the district in which such parallel lines may be operated. Such application for abandonment shall not be made until after it shall have been authorized by resolution of the board of directors of the corporation under its seal, and such resolution shall have been submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by section one hundred and forty-eight of this chapter. If the stockholders shall at such meeting ratify such action of the directors, the secretary of the corporation shall so certify under the seal of the corporation, upon such resolution. If approved by the commission, such approval shall be indorsed upon such resolution and annexed thereto, and such resolution shall thereupon be filed and recorded in the office of the secretary of state and the date of such abandonment shall be as of the date of such filing. The property of any person, taken, affected or damaged by such abandonment shall be deemed to be required for a public purpose, and if such corporation, before making application to the public service commission, shall have been unable to agree with any person damaged or claiming to be damaged as a result of such abandonment, as to the compensation, if any, which should justly be made therefor, such property, when paid for by such corporation as hereinafter provided, shall be deemed to have been taken by condemnation, and the proceeding thereon, as herein provided, shall be deemed to be a special proceeding, and subject to all the provisions of the code of civil procedure regulating

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special proceedings. Any such railroad corporation shall have the right within thirty days after filing such resolution and approval, to make application by verified petition to a special term of the supreme court in and for the county or one of the counties in which the portion of the route to be abandoned may be located, for the appointment of commissioners to ascertain and determine the compensation, if any, which shall justly be made for the property of any person so taken, affected or damaged and such abandonment shall not be deemed to be effective against such person unless and until said corporation shall have filed in the office of the clerk of the county in which said application shall have been made, an undertaking in an amount approved by the court that it will pay to the person or persons determined to be damaged by the abandoment the amounts, if any, finally awarded to him or them in the proceedings; notice of the appointment of such commissioners and of the time and place of their first meeting shall be published once a week for four successive weeks in two newspapers published in said county or counties, and affidavits of such publication and the filing of such undertaking shall be filed in the office of the public service commission. If such corporation shall fail to file such petition within said period of thirty days, any person or persons claiming to be damaged, may by separate petition to the court apply for the appointment of commissioners to ascertain and determine the said compensation with like effect as if such corporation had filed its petition. Nothing in this act shall be construed to impair or affect the rights of any lienor or mortgagee in and to the portion of the property of the said railroad or railroads affected by said abandonment, and no such abandonment shall be consented to as herein provided unless such liens or mortgages shall have first been discharged of record.

This section was derived from the Railroad Law of 1890, § 70, as amended by L. 1892, ch. 676. Subdivision 1 was amended by L. 1911, ch. 506. The amendment is shown in the footnote.

Section 140 of the Railroad Law of 1890 is now covered by section 241.

Combinations prohibited: see STOCK CORPORATION LAW, § 14.

Liability of one railroad corporation possessing stock control of another for acts and contracts of the latter: see 35 L. R. A. (N. S.) 770, note.

Constitutional and statutory restrictions upon railroad combinations: see 1 L. R. A. 849, note.

Right to consolidate.— "Railroad corporations exist solely by virtue of the statutes, and can be consolidated only by enabling statutes." People v. Boston, etc., R. Co., (1882) 12 Abb. N. Cas. 230.

"The right to consolidate is merely permissive; it is no violation of any statute to contract against the exercise of such a right." Boyd v. New York, etc., R. Co., (1915) 220 Fed. 174.

Continuous or connected lines.— Formerly the statute authorized the consolidation only of "continuous" lines (and not continuous or connected lines) and this was held to preclude the consolidation of a main line with a connected branch line, or of two lines running in the same direction to diverging termini. People v. Boston, etc., R. Co., (1882) 12 Abb. N. Cas. 230. The decision of the public service commission that two lines are continuous or connected is entitled to great weight. Venner v. New York Cent. R. Co., (1916) 94 Misc. 671, 158 N. Y. S. 602, affirmed (1917) 177 App. Div. 296.

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Foreign and domestic corporations.— This section so far as it authorizes a consolidation of foreign and domestic corporations is not a usurpation of the power of Congress over interstate commerce. Boardman v. Lake Shore, etc., R. Co., (1881) 84 N. Y. 157. But where some of the constituent corporations are organized under the laws of other states the legislature is impotent alone to authorize a consolidation, which must be authorized by the laws of the states where the corporations exist, and whether the new corporation in such a case is one *de jure* is a mooted question. In any event it is not one "incorporated by or under a general or special law of this state." People v. New York, etc., R. Co., (1892) 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82, reversing 61 Hun 66, 15 N. Y. S. 635. A corporation formed by a consolidation of domestic and foreign corporations under this section is a domestic and not a foreign corporation. Matter of Sage, (1877) 70 N. Y. 220.

Creation of new corporation.— In the case of domestic corporations a consolidation under this and the succeeding section creates a new corporation and the constituent corporations are deemed to be dissolved and all their powers and property are transferred to the new corporation. People v. New York, etc., R. Co., (1892) 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82, reversing 61 Hun 66, 15 N. Y. S. 635; Matter of Bergdorf, (1912) 149 App. Div. 529, 133 N. Y. S. 1012, affirmed (1912) 206 N. Y. 309; Parish v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109; Op. Atty.-Gen. (1895) 60. Accordingly it was held in People v. New York, etc., R. Co., (1892) 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82, reversing 61 Hun 66, 15 N. Y. S. 635, that the new corporation was one "incorporated by or under a general or special law of this state" and liable to pay an incorporation tax under L. 1886, ch 143, where the constituent corporations were domestic corporations. So far as creditors of one of the constituent corporations are concerned, however, the consolidated corporation is the successor of the old corporations. Boardman v. Lake Shore, etc., R. Co., (1881) 84 N. Y. 157.

Cited.— This section was cited in Lee v. Stillwater, etc., St. R. Co., (1910) 140 App. Div. 779, 125 N. Y. S. 840 (see sec. 143); People v. Barker, (1907) 121 App. Div. 661, 106 N. Y. S. 336, affirmed (1910) 200 N. Y. 509, 93 N. E. 378 (see sec. 143); Verner v. New York Cent. R. Co., (1916) 94 Misc. 671, 158 N. Y. S. 602, affirmed (1917) 177 App. Div. 296 (see sec. 150).

§ 141. Conditions. Such consolidation shall be made in the following manner:

1. Joint agreement; amount of capital stock. The directors of the corporations proposing to consolidate may enter into a joint agreement, under the corporate seal of each corporation, for the consolidation of such corporations, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each corporation into that of the new corporation, and how and when the directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of such corporations. But in no case shall the capital stock of the corporation formed by such consolidation exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof. Nor shall any bonds or other evidences of debt be issued as a consideration for, or in connection with, such consolidation. If either of the corporations so to be consolidated is a corporation

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organized under the laws of any other state the joint agreement herein provided for may fix the location of the principal office of the new corporation in either state.

2. Agreement to be submitted to meeting of stockholders. If stockholders owning two-thirds of all the stock of each of such corporations shall by a consent in writing, acknowledged as are deeds entitled to be recorded and indorsed upon said lease or agreement, signify their assent thereto, it shall be deemed and taken as the adoption of such agreement by and on behalf of such corporation, and the original or a certified copy thereof shall be filed as hereinafter provided. If such agreement shall not be consented to in writing by holders of two-thirds of the stock of either of such corporations as hereinbefore provided, such agreement shall be submitted to the stockholders of each of such corporations at a meeting thereof called separately for the purpose of taking the same into consideration. Due notice of the time and place of holding such meeting, and the object thereof, shall be given by each corporation to its stockholders by written or printed notices addressed to each of the persons in whose names the capital stock of such corporation stands on the books thereof, and delivered to such persons respectively, or sent to them by mail, when their post-office address is known to the corporation, at least thirty days before the time of holding such meeting, and also by a general notice published at least once a week for four weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office or place of business. At such meeting of stockholders such agreement shall be considered, and a vote by ballot taken for the adoption or rejection of the same, and if the votes of the stockholders owning at least two-thirds of the stock of each corporation present and voting in person or by proxy shall be for the adoption of such agreement, then that fact shall be certified thereon by the secretaries of the respective corporations, under the seal thereof, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of state, and in the office of the clerk of the county where the new corporation is to have its principal place of business, and shall from thence be deemed and taken to be the agreement and act of consolidation of such corporations, and thereafter such corporations, parties thereto, shall be one corporation by the name provided in such agreement, but such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated.

This section was derived from the Railroad Law of 1890, § 71, subdivision 1, as amended by L. 1904, ch. 228, § 1; subd. 2 as amended by L. 1892, ch. 676. Section 141 of the Railroad Law of 1890 is now covered by section 242.

Amount of capital stock.—A violation of the provision that the stock of the consolidated corporation shall not exceed the total stock of the constituents invalidates the consolidation. People v. Boston, etc., R. Co., (1882) 12 Abb. N. Cas. 230.

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Consideration for consolidation.—The provision against the issuance of bonds as a consideration for the consolidation is violated by an issue of bonds as collateral to an agreement to buy a majority of the stock at par of one of the constituents and pay its debts, which is done to secure the assent of the stockholders. People v. Boston, etc., R. Co., (1882) 12 Abb. N. Cas. 230. The provision, however, must be read in connection with section 142 and is not violated by the issuance of bonds by the consolidated corporation to refund existing bonds of the same amount but changing the security, though the new bonds bear a higher rate of interest. Continental Securities Co. v. New York Cent., etc., R. Co., (1916) 217 N. Y. 119, 111 N. E. 484, affirming 168 App. Div 345, 153 N. Y. S. 879.

Filing of articles when principal office is to be outside of state.—Where the articles of consolidation show that the principal office is to be located in another state they may be filed in the office of the secretary of state, the provision concerning filing in the clerk's office having no application. Op. Atty.-Gen. (1894) 404.

Cited.—This section was cited in People v. New York, etc., R. Co., (1892) 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82 (see sec. 140); Lee v. Stillwater, etc., St. R. Co., (1910) 140 App. Div. 779, 125 N. Y. S. 840 (see sec. 143).

§ 142. New corporation. Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation. And it shall be lawful for any railroad company or corporation, now or hereafter formed by the consolidation of one or more railroad companies or corporations organized under the laws of this state, or under the laws of this state and other states, with one or more railroad companies or corporations organized under the laws of any other state, or the laws of this state and other states, to issue its bonds for the purpose of paying or retiring any bonds theretofore issued by either of said companies or corporations so consolidated, or for any purpose and to the amount authorized by the laws of the state under which either of said companies or corporations so consolidated was organized, and secure the same by a mortgage upon its real or personal property, franchises, rights and privileges, whether within or without this state, and subject to the remedies for the enforcement of the same under the laws of either of said states. Nothing in this article contained shall authorize the execution of any such

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mortgage without the consent of the stockholders as now required by the laws of this state, nor compel any bondholder to accept payment in whole or in part of any bond or bonds held by him or to surrender the same before they shall become due.

This section was derived from the Railroad Law of 1890, § 72, as amended by L. 1891, ch. 362, § 1. Section 142 of the Railroad Law of 1890 is now covered by section 243.

Power to borrow money and to mortgage property: see STOCK CORPORATION LAW, § 6.

Validating corporate mortgages: see STOCK CORPORATION LAW, § 7.

Railroad aid bonds: see GENERAL MUNICIPAL LAW, § 220 et seq.

Issuance of refunding bonds.—The consolidated corporation may issue bonds to refund a bond issue of one of the constituents and substitute other security. Continental Securities Co. v. New York Cent., etc., R. Co., (1916) 217 N. Y. 119, 111 N. E. 484, affirming 168 App. Div. 345, 153 N. Y. S. 879.

Immunity from mileage book act.—The inapplicability of section 60, requiring the issuance of mileage books by railroads more than one hundred miles in length, to the constituent companies because they are not one hundred miles long is not a "right, privilege, exemption or franchise" which passes to the consolidated company. People v. Ulster, etc., R. Co., (1908) 192 N. Y. 353, 85 N. E. 153, reversing 113 App. Div. 894, 98 N. Y. S. 1109.

Cited.—This section was cited in Rochester R. Co. v. Rochester, (1906) 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784, affirming (1905) 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773 (see § 149); People v. New York, etc., R. Co., (1892) 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82 (see § 140); Polhemus v. Fitchburg R. Co., (1890) 123 N. Y. 502, 26 N. E. 31 (see § 143); Lee v. Stillwater, etc., St. R. Co., (1910) 140 App. Div. 779, 125 N. Y. S. 840 (see § 143); People v. Barker, (1907) 121 App. Div. 661, 106 N. Y. S. 336, affirmed (1910) 200 N. Y. 509, 93 N. E. 378 (see § 143).

§ 143. Creditors' rights not to be impaired. The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party.

This section was derived from the Railroad Law of 1890, § 73.

Liability of stockholders and limitation of stockholder's liability: see STOCK CORPORATION LAW, §§ 56, 57, 58, 59.

Liability of successor of railroad company for damages to abutting property from construction of road in street: see L. R. A. 1915D 397, note.

Cumulative preferred dividends.—The consolidated corporation is liable to holders of cumulative preferred stock of one of the constituent corporations for cumulative dividends which should have been, but were not, paid before dividends were paid on the common stock. Boardman v. Lake Shore, etc., R. Co., (1881) 84 N. Y. 157.

Mortgage liens.—This section formerly excepted mortgages from the liens and liabilities which should attach to the consolidated corporation, but this was held merely to prevent the extension of the mortgage lien to new properties and not to relieve the new corporation from liability on bonds of a constituent secured by mortgage, so that a limited assumption of such bonds was

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unwarranted. Polhemus v. Fitchburg R. Co., (1890) 123 N. Y. 502, 26 N. E. 31, affirming 50 Hun 397, 3 N. Y. S. 327, and in effect overruling Janes v. Fitchburg R. Co., (1888) 50 Hun 310, 3 N. Y. S. 165. Under the contrary doctrine of the case last cited it was held that an action might be maintained against the constituent corporation after consolidation. Gale v. Troy, etc., R. Co., (1889) 51 Hun 470, 4 N. Y. S. 295.

Deduction of liens on assessment.—Where one of the constituent companies has outstanding bonds secured by mortgages, which the consolidated corporation assumes under this section, the transfer is in the nature of a transmission of property and indebtedness, and not a purchase so as to deprive the consolidated corporation of a right to deduction for the purpose of an assessment of its stock for taxation. People v. Barker, (1907) 121 App. Div. 661, 106 N. Y. S. 336, affirmed on opinion below (1910) 200 N. Y. 509, 93 N. E. 378.

Actions against constituents.—Where, after a cause of action has accrued against a railway company, it consolidates with other companies an action thereafter brought must be against the new corporation, and cannot be maintained against the old. Lee v. Stillwater, etc., R. Co., (1910) 140 App. Div. 779, 125 N. Y. S. 840. But see Gale v. Troy, etc., R. Co., (1889) 51 Hun 470, 4 N. Y. S. 295. And a judgment by default against the old corporation is of no effect. Cameron v. United Traction Co., (1902) 67 App. Div. 557, 73 N. Y. S. 981. In the case of actions pending at the time of consolidation, however, the action may be prosecuted to final judgment against the old corporation or the new corporation may be substituted as a party. Cameron v. United Traction Co., (1902) 67 App. Div. 557, 73 N. Y. S. 981.

§ 144. Assessment of property of new corporation. The real estate of such new corporation, situate within this state, shall be assessed and taxed in the several towns and cities where the same shall be situated in like manner as the real estate of other railroad corporations is or may be taxed and assessed, and such proportion of the capital stock and personal property of such new corporation shall in like manner be assessed and taxed in this state, as the number of miles of its railroad situate in this state bears to the number of miles of its railroad situate in the other state or states.

This section was derived from the Railroad Law of 1890, § 74.

§ 145. Stocks of municipal corporations, how represented. At any meeting of the stockholders of any railroad corporation to consider any agreement or proposition to consolidate or lease, the commissioners or other officers of any municipal corporation holding or having charge of any of the capital stock of such railroad corporation shall represent such municipal corporation, and may act and vote in person or by proxy on all matters relating to such consolidation or lease in the same manner as individual stockholders.

This section was derived from the Railroad Law of 1890, § 75, as amended by L. 1893, ch. 546, § 1.

§ 146. Foreclosure of mortgages made by consolidated railroads partly in the state. Whenever a railroad corporation of this or of any other state or states whose line of road lies partly in this state and partly in another state or states, shall have executed a mortgage upon its entire line of railroad, and a sale

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of the entire line of road under such mortgage shall have been or may hereafter be ordered, adjudged and decreed by a court of competent jurisdiction of the state or states, or by a court of the United States sitting within the state or states in which the greater part of such line of railroad may be situated, upon the confirmation of such judgment or decree, and of the sale made thereunder, by the supreme court of this state or by the circuit court of the United States in the judicial district in which some part of such line of road is situated, such sale shall operate to pass title to the purchaser, of that part of the line of railroad lying in this state, together with its appurtenances and franchises, with the same force and effect as if the judgment or decree under which such sale is had, had been made by a court of competent jurisdiction of this state. Such judgment or decree and sale may be so ordered, adjudged, decreed or confirmed in any action or proceeding heretofore or hereafter brought in the supreme court, or in a court of the United States sitting in this state, for the foreclosure of such mortgage, or in aid of an action for that purpose in such other state or states, if it shall appear that such confirmation is for the interest of the public and of the parties, due and lawful provision being made for and in respect of any liens upon that part of the line of road or other property sold situate in this state, and for such costs, expenses and charges as may appear to be just and lawful. If a receiver of the entire line of such railroad shall have been, or may hereafter be appointed by such court of competent jurisdiction of the state in which the greater part of the line of railroad is situated, or by a court of the United States sitting in such other state, such receiver may perform, within this state, the duties of his office not inconsistent with the laws of this state, and may sue and be sued in the courts of this state.

This section was derived from the Railroad Law of 1890, § 76, as amended by L. 1896, ch. 356, § 1.

§ 147. Powers of corporations organized to acquire and operate railroads partly in the state. A railroad corporation created under the laws of the state or states in which the greater part of the line of its railroad may be situated, or a railroad corporation created under this chapter or under article two of the stock corporation law in this state, for the purpose of taking title to, and operating, the line of road as so sold, under a judgment or decree of a court of this state, or of a court of the United States sitting in this state, for the foreclosure of a mortgage, with its franchises and appurtenances, may hold, possess and operate not only those parts of the railroad lying in other states, but also that part of the line of such railroad lying in this state, and shall be subject to the duties and liabilities to which such corporation was, by the laws of this state, subject, and to such further or other duties and liabilities as are now or may hereafter be imposed by law upon

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railroad corporations of this state, and the provisions of the stock corporation law concerning reorganization of corporations shall apply to, and in respect of, every such successor railroad corporation. An exemplified copy of the certificate or certificates of incorporation, under and by virtue of which any such corporation is created in any other state, and a certified copy of the judgment or decree of any court sitting in any other state, under which said railroad shall have been sold, and a certified copy of the order or judgment or decree of confirmation and approval required by the preceding section, or of the order, judgment or decree of the court of this state, or of the United States in this state, which decreed the sale, confirming the same, shall be filed in the office of the secretary of state for this state, and in the office of the county clerk of the county where its principal business office in this state is or shall be located.

This section and the preceding one shall apply in respect of decrees, foreclosure, sales, confirmations, reorganizations and incorporations, whether heretofore or hereafter made, provided, however, that nothing in either of said sections shall affect any action or proceeding pending in any court, on or before the first day of April, eighteen hundred and ninety-six, to establish the invalidity of any foreclosure or reorganization theretofore had, or to enforce any judgment or claim arising before such foreclosure or reorganization.

This section was derived from the Railroad Law of 1890, § 77, as amended by L. 1896, ch. 356, § 2, as to the first paragraph; the second paragraph came from L. 1896, ch. 356, § 3.

§ 148. Lease of road. Subject to the permission and approval of the public service commission, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guaranty of the stock and bonds of either of such corporations by the other and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at an annual meeting of the stockholders for the purpose of electing directors, called in the manner prescribed by law, provided that the notice of such meeting shall state that one of the purposes thereof will be the approval of such lease, or at a meeting, called separately for that purpose upon a notice stating the time, place and object of the meeting,

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served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be indorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation can not be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contracts shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. If any contract so recorded shall be or has been terminated by the contracting corporations in pursuance of resolutions of their respective boards of directors prior to the time specified in such contract for the termination thereof, then the contracting corporations shall execute, acknowledge and procure to be recorded in each office where such contract is recorded a certificate to the effect that such contract has been terminated, stating the date of the termination thereof, and said certificates so recorded shall be presumptive evidence of the termination of such contract accordingly. Nothing in this section shall apply to any lease in existence prior to May first, eighteen hundred and ninety-one.

This section was derived from the Railroad Law of 1890, § 78, as amended by L. 1905, ch. 695, § 1.

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I. In General

Common law power.—"It is well settled that, unless authorized thereto by statute, a railroad corporation organized under our General Railroad Act has no authority to transfer or lease its road." Troy, etc., R. Co. v. Boston, etc., R. Co., (1881) 86 N. Y. 107; Abbott v. Johnstown, etc., R. Co., (1880) 80 N. Y. 27, 36 Am. Rep. 572; Gere v. New York Cent., etc., R. Co., (1885) 19 Abb. N. Cas. 193.

Source of section.—The authority conferred by this section was first contained in L. 1839, ch. 218, sec. 1, and has continually been in force since that time, this section being but a continuation of the former law. Ingersoll v. Nassau Electric R. Co., (1890) 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236, affirming 89 Hun 213, 34 N. Y. S. 1044; People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75.

Effect of Rapid Transit Act.—The right to lease a railroad under this section, or to acquire the right to use its tracks, is not affected by the Rapid

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Transit Act of 1875 (sec. 220 et seq.). People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75.

Consent of municipality and abutters.—No consent of the local authorities or of abutting owners is essential to the use of the tracks of one railway by another, and no constitutional provision is infringed by such a construction of this section. Ingersoll v. Nassau Electric R. Co., (1899) 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236, affirming 89 Hun 213, 34 N. Y. S. 1044; People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75; Roddy v. Brooklyn, etc., R. Co., (1898) 32 App. Div. 311, 52 N. Y. S. 1025, affirming 23 Misc. 373, 52 N. Y. S. 885; Kunz v. Brooklyn Heights R. Co., (1898) 25 Misc. 334, 54 N. Y. S. 187.

Leases prior to May 1, 1891.—The exception of leases made prior to May 1, 1891, is not applicable to a railroad holding leases prior to that date which subsequent thereto entered into a lease with another company, and the latter lease takes the case out of the exception. McLaughlin v. New York City R. Co., (1905) 106 App. Div. 1, 94 N. Y. S. 653, overruling Topham v. Interurban St. R. Co., (1904) 96 App. Div. 323, 89 N. Y. S. 298, on the authority of O'Reilly v. Brooklyn Heights R. Co., (1904) 179 N. Y. 450, 72 N. E. 517.

Corporate existence of lessor.—The right of the lessee to operate the road is dependent on the corporate existence of the lessor so that it is entitled to be admitted as a party and defend an action to forfeit its lessor's charter. People v. Albany, etc., R. Co., (1879) 77 N. Y. 232.

Cited.—This section was cited in Willcox v. Richmond Light, etc., Co., (1910) 142 App. Div. 44, 128 N. Y. S. 266, affirmed (1911) 202 N. Y. 515, 95 N. E. 1141; O'Connor v. Brooklyn Heights R. Co., (1908) 123 App. Div. 784, 108 N. Y. S. 471; Baron v. New York City R. Co., (1907) 120 App. Div. 134, 105 N. Y. S. 258 (see section 181); O'Reilly v. Brooklyn Heights R. Co., (1904) 95 App. Div. 253, 89 N. Y. S. 41, affirmed (1904) 179 N. Y. 450; Lowenstein v. International R. Co., (1912) 75 Misc. 357, 132 N. Y. S. 653; Mannion v. International R. Co., (1910) 66 Misc. 420, 121 N. Y. S. 263; People v. Feitner, (1902) 38 Misc. 204, 77 N. Y. S. 218, 75 App. Div. 527; 174 N. Y. 532.

II. Leases Within Section

In general.—This section authorizes both traffic agreements and leases. Ingersoll v. Nassau Electric R. Co., (1899) 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236, affirming 89 Hun 213, 34 N. Y. S. 1044. It also authorizes a lease of all the property of a railroad. Wormser v. Metropolitan St. R. Co., (1904) 98 App. Div. 29, 90 N. Y. S. 714, 37 Misc. 618, 76 N. Y. S. 151, affirmed (1906) 184 N. Y. 83, 76 N. E. 1036, 112 A. S. R. 596, 6 Ann. Cas. 123; Westchester Fire Ins. Co. v. Syracuse, etc., R. Co., (1916) 97 Misc. 471, 161 N. Y. S. 759; Roosa v. Brooklyn Heights R. Co., (1899) 28 Misc. 387, 59 N. Y. S. 664; Gere v. New York Cent., etc., R. Co., (1885) 19 Abb. N. Cas. 193.

Lease for corporate life.—A lease for the corporate life of the lessor is authorized by this section and authorizes the lessor to operate the road with all the privileges attached to the franchise of the lessor. Fisher v. New York Cent., etc., R. Co., (1871) 46 N. Y. 644.

Lease beyond corporate life.—A railroad may lease its property for a term exceeding its corporate life, where that may be extended, and the lease is at least valid for the corporate life. Gere v. New York Cent., etc., Co., (1885) 19 Abb. N. Cas. 193.

Lease contemplating discontinuance.—This section contemplates a lease for use and does not authorize a lease contemplating a discontinuance of all use of the leased road. Troy, etc., R. Co. v. Boston, etc., R. Co., (1881) 86 N. Y. 107.

Steam and street railroads.—Under this section "a steam railroad corporation can lease another steam surface railroad, a street surface railroad or an elevated railroad. So with a street surface railroad. It may lease another street surface railroad or a steam surface railroad or an elevated road." People v. Brooklyn Heights R. Co., (1907) 187 N. Y. 48, 79 N. E. 838. In other words this section applies to both steam and street surface railroads. Ingersoll v. Nassau Electric R. Co., (1899) 157 N. Y. 453, 52 N. E. 453, 52 N. E. 545, 43 L. R. A. 236, affirming 89 Hun 213, 34 N. Y. S. 1044; Matter of Interborough-Metropolitan Co., (1908) 125 App. Div. 804, 110 N. Y. 186

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(see § 150); Roddy v. Brooklyn, etc., R. Co., (1898) 32 App. Div. 311, 52 N. Y. S. 1025, affirming 23 Misc. 373, 52 N. Y. S. 885.

Milburn agreement.—The Milburn agreement, operative in the city of Buffalo, has been held not an agreement within this section. Catalano v. Crosstown St. R. Co., (1912) 137 N. Y. S. 118.

Joint ownership and operation.—So far as the public is concerned, where one railway company owns all of the stock of another and has the same officers, and the two roads are used by the cars of both companies and are run as one system, the arrangement is a lease or traffic arrangement within this section though there is no written contract. Catalano v. International R. Co., (1914) 145 N. Y. S. 1005.

Agreement to accept transfer.—An agreement to accept a transfer of passengers from one line to another is not an agreement "for the use of their respective roads or routes" within this section. Schenk v. International R. Co., (1914) 146 N. Y. S. 365.

III. Validity of Lease

Formalities, generally.—This section makes a distinction between traffic agreements, whereby both roads use the line in common, and a lease whereby the lessee is given exclusive possession, and the section prescribes formalities necessary to be observed in the latter case. Roosa v. Brooklyn Heights R. Co., (1899) 28 Misc. 387, 59 N. Y. S. 664.

Approval of traffic agreement.—An agreement whereby one corporation is given the perpetual right to operate its cars on the road of another corporation in common with the latter is not a "lease" for more than one year requiring the approval of stockholders. Chapman v. Syracuse Rapid Transit R. Co., (1898) 25 Misc. 626, 56 N. Y. S. 250.

Lease to individual.—It has been held that a railroad corporation cannot lease its road to an individual, and if it does so it still remains liable to the public for an injury due to the negligence of an employee on the railroad. Abbott v. Johnstown, etc., R. Co., (1880) 80 N. Y. 27, 36 Am. Rep. 572. Even if this section does not authorize a lease by a railroad corporation to an individual, a railroad corporation which has subsequently leased the road of the individual cannot contest its lessor's title in an action to recover rent. Woodruff v. Erie R. Co., (1883) 93 N. Y. 609, reversing 25 Hun 246.

Inadequacy of consideration.—A lease of all the property of a railroad, in consideration of a rental based on a fixed interest on the common stock of the lessor, has been condemned as against minority stockholders where it provided for the issuance of construction bonds by the lessor at the request of the lessee, with no obligation on the part of the lessee to pay the principal or interest on the same. Westchester Fire Ins. Co. v. Syracuse, etc., R. Co., (1916) 97 Misc. 471, 161 N. Y. S. 759.

Common directors.—The fact that the directors of two railroads are identical does not condemn a lease made by them where the same was approved by the stockholders of both companies. Westchester Fire Ins. Co. v. Syracuse, etc., R. Co., (1916) 97 Misc. 471, 161 N. Y. S. 759.

Effect of approval of commission.—The fact that the public service commission has approved a lease is not an adjudication which is binding on stockholders, the approval being required merely for the protection of the public. Westchester Fire Ins. Co. v. Syracuse, etc., R. Co., (1916) 97 Misc. 471, 161 N. Y. S. 759.

Estoppel by accepting benefits.—A stockholder who has availed himself of the benefits of a lease of the railroad, as by electing to take stock in a corporation in pursuance of the terms of the leasing contract, cannot question the regularity of the lease. Wormser v. Metropolitan St. R. Co., (1906) 184 N. Y. 83, 76 N. E. 1036, 112 A. S. R. 596, 6 Ann. Cas. 123, affirming 98 App. Div. 29, 90 N. Y. S. 714. But the acceptance of a cash dividend which was in no way made possible by the execution of a lease, the same being paid from the cash surplus of the corporation, is not an acceptance of benefits within this rule. Westchester Fire Ins. Co. v. Syracuse, etc., R. Co., (1916) 97 Misc. 471, 161 N. Y. S. 759.

Demand as condition to suit.—In order to sue to set aside a lease fraudulently made a minority stockholder must first demand of the officers of the

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corporation that they bring action, which must be followed by a refusal or unreasonable neglect to sue. Flynn v. Brooklyn City R. Co., (1899) 158 N. Y. 493, 53 N. E. 520, affirming 9 App. Div. 269, 41 N. Y. S. 566.

Purchase of shares for purpose of suit.— One who has purchased shares at the instance of a rival railroad for the sole purpose of bringing suit is not entitled to an injunction to restrain the execution of an alleged illegal lease. Jenkins v. Auburn City R. Co., (1898) 27 App. Div. 553, 50 N. Y. S. 852.

Free passage under invalid lease.—The fact that a lease is not in writing as required by this section does not entitle a passenger to free passage over the leased line, as he cannot assert the invalidity of the lease. Enton v. Nassau Electric R. Co., (1910) 68 Misc. 385, 124 N. Y. S. 555.

IV. Rights and Liabilities of Parties

Liability of lessor of railroad for negligent or illegal operation of railroad by lessee: see notes, 2 Ann. Cas. 861; 10 Ann. Cas. 350; Ann. Cas. 1915D 996.

Duty of lessee of railroad as to condition of track: see 6 L. R. A. (N. S.) 787 note.

Duty of lessee or licensee as to railroad fences: see Ann Cas. 1917A 539 note.

Liability of railroad lessee to its servant for condition of track: see 6 L. R. A. (N. S.) 787 note.

Pleading in action for damages caused by lessee: see 9 Ann. Cas. 682 note.

Torts of lessee.—A lessor railroad is not liable for the negligence or torts of the lessee. Miller v. New York, etc., R. Co., (1890) 125 N. Y. 118, 26 N. E. 35. And where pursuant to this section one railroad is permitted to run its trains over another railroad under a traffic arrangement whereby the latter has a supervision over operation, the owner of the roadbed is not liable for the negligent operation of a train by its licensee. Cain v. Syracuse, etc., R. Co., (1898) 27 App. Div. 376, 50 N. Y. S. 1. The act of a lessee under a long term lease in filling in a trestle causing damage to an abutter is a tort for which the lessor is not liable even though it is under contract obligation to issue bonds for such construction work. Miller v. New York, etc., R. Co., (1890) 125 N. Y. 118, 26 N. E. 35.

Condemnation proceedings.— Notwithstanding the execution of a lease of all its property under this section the lessor may still maintain condemnation proceedings to acquire lands necessary for use in connection with the road. Matter of New York, etc., R. Co., (1885) 99 N. Y. 12, 1 N. E. 27, affirming 35 Hun 220.

Obligations of lessee.—"Where one railroad corporation undertakes to lease and operate another road, it assumes all the duties, obligations and requirements imposed by the statute and the character of such road." People v. Brooklyn Heights R. Co., (1907) 187 N. Y. 48, 79 N. E. 838.

Transfers.— Under this section an interurban railway company using the tracks of a local street railway is bound to honor transfers of the local company for transportation within the city limits where the local company is under obligation to permit such transfer on all of its local lines. Weber v. Rochester, etc., R. Co., (1911) 145 App. Div. 84, 129 N. Y. S. 304. Corporations entering into a traffic agreement under this section are the ones referred to in subd. 7 of section 49 of the Public Service Commissions Law imposing the duty to give transfers. Oatman v. International R. Co., (1917) 163 N. Y. S. 495.

§ 149. Lessees of railroad may acquire stock therein. Subject to the permission and approval of the public service commission, any railroad corporation created by the laws of this state, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road

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is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred and a certificate thereof filed in the office of the secretary of state, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation, to whom such surrender or transfer of such stock shall have been made, and in the corporate name of such corporation. Where stock shall have been so surrendered or transferred, the existing liabilities of the corporation, and the rights of the creditors and of any stockholder not surrendering or transferring his stock, shall not be affected thereby.

This section was derived from the Railroad Law of 1890, § 79.

Purchase of stock of other corporations: see STOCK CORPORATION LAW, § 52.

Consolidation of leased lines.—Where a corporation which has leased two railroads acquires the stock of both and merges them under this section it still owes to the public the duties which it owed as lessee. Braffett v. Brooklyn, etc., R. Co., (1912) 204 N. Y. 440, 97 N. E. 888.

Dissolution of lessor.—Where the lessee has acquired all of the stock of the lessor and has complied with this section the lessor is thereby dissolved as a corporation. Rochester R. Co. v. Rochester, (1906) 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784, affirming (1905) 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

Paving immunity.—The immunity of a lessor railway from the burden of paving between its tracks is not a privilege which passes to the lessee under this section on an acquisition of the stock of the lessor. Rochester R. Co. v. Rochester, (1906) 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784, affirming (1905) 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

Rate of fare.—Where a lessee railroad, owning independent lines, acquires the stock of its lessor it may charge a rate of fare on tracks of the lessor authorized by the latter's franchise though in excess of the rate which it may charge on its own lines, but it cannot charge such excess for travel on tracks constructed by the lessee though between the termini of the lessor. Fisher v. New York, etc., R. Co., (1871) 46 N. Y. 644.

Effect of acquisition.—The effect of proceeding under this section is not to effect a consolidation. Op. Atty.-Gen. (1895) 60.

Cited.—This section was cited in Conway v. Rochester, (1897) 24 App. Div. 489, 49 N. Y. S. 244, reversed (1908) 157 N. Y. 33; Oelbermann v. New York, etc., R. Co., (1894) 77 Hun 332, 29 N. Y. S. 545 (see sec. 150).

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§ 150. Consolidation and lease of parallel lines prohibited. No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads, or lease the same, the one to the other, unless the public service commission shall consent thereto.

This section was derived from the Railroad Law of 1890, § 80, as amended by L. 1892, ch. 676.

Combinations prohibited: see STOCK CORPORATION LAW, § 14.

Restrictions on consolidation of parallel or competing railroads: see 45 L. R. A. 271 note.

Leases and traffic agreements.— This section prohibits leases to parallel roads but was not intended to preclude such companies from making traffic contracts for the partial use of their respective roads beyond the line of parallelism. People v. O'Brien, (1888) 111 N. Y. 1, 18 N. E. 692, 7 A. S. R. 684, 2 L. R. A. 255. Before this section contained an express prohibition against leasing it was held that the prohibition against merging or consolidating did not apply to a lease. Gere v. New York Cent., etc., R. Co., (1885) 19 Abb. N. Cas. 193.

Purchase of stock in competing railroad.—This section does not prohibit a purchase by a railroad corporation of stock in a competing railroad corporation. Oelbermann v. New York, etc., R. Co., (1894) 77 Hun 332, 29 N. Y. S. 545.

Holding corporation.— It has been held that the provisions of this section cannot be evaded by organizing a corporation under the Stock Corporation Law as a holding corporation of the stock of competing companies. Continental Securities Co. v. Interborough Rapid Transit Co., (1908) 165 Fed. 945.

Stock ownership as affecting consolidation.—The mere fact that one of the constituent corporations owns a majority of the stock of another railroad which is parallel and competing with another of the constituent companies does not bring the case within this section though such stock will belong to the consolidated corporation. Venner v. New York Cent., etc., R. Co., (1916) 94 Misc. 671, 158 N. Y. 602, affirmed (1917) 177 App. Div. 296.

Street railways.— It seems that the consolidating or leasing of parallel and competing lines of street railways is permitted. Matter of Interborough-Metropolitan Co., (1908) 125 App. Div. 804, 110 N. Y. S. 186.

Railroads in cities.—This section authorizes railroads in cities, although not street surface railways, to control parallel and competing lines, provided they have the consent of the public service commission. Continental Securities Co. v. Interborough Rapid Transit Co., (1915) 221 Fed. 44, 136 C. C. A. 570.

Cited.—This section was cited in Delavan v. New York, etc., R. Co., (1912) 154 App. Div. 8, 139 N. Y. S. 17 (per Laughlin, J., dissenting).

§ 151. Mortgagee may purchase at foreclosure sale. Any mortgagee of the property and franchises of any railroad corporation may become the purchaser of the same at any sale thereof under the mortgage, upon foreclosure by advertisement, or under a judgment, or decree, or otherwise, and hold and use the same, with all the rights and privileges belonging thereto or connected therewith for the period of six months, and convey the same to any railroad corporation.

This section was derived from the Railroad Law of 1890, § 81.

Cited.—This section was cited in Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1066, reversing 123 App. Div. 93, 108 N. Y. S. 255; People v. Public Service Commission, (1911) 145 App. Div. 318, 130 N. Y. S. 97, affirmed (1911) 203 N. Y. 299; In re Philip, (1916) 95 Misc. 709, 160 N. Y. S. 49, (1916) 176 App. Div. 924 mem., (1917) 220 N. Y. 644 mem.

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§ 152. Certificates of stock may be issued after foreclosure in certain cases. If any person or corporation shall be entitled to certificates of stock subscribed to and paid for in any railroad corporation whose property and franchises have been sold under mortgage foreclosure, and such certificates have not been issued before foreclosure, the officers of the corporation shall, at any time within six months after the foreclosure sale, issue and deliver to the person or corporation entitled thereto, upon demand, such certificates of stock, which shall have all the force and effect and confer upon the holder all the rights which he would have had if such certificates of stock had been issued at the time of the payment of the subscription thereto.

This section was derived from the Railroad Law of 1890, § 82.

§ 153. Liabilities of reorganized railroad corporations. A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the public service commission shall certify that in its opinion the public interests under all the circumstances do not require such extension. If such commission shall so certify and shall file in its office such certificate, which certificate shall be irreversible by such commission, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which had been constructed and operated prior to May first, eighteen hundred and ninety-one, nor apply to Kings county.

This section was derived from the Railroad Law of 1890, § 83.

Loss of franchise.—Where a certificate is filed under this section the removal of the obligation to construct the balance of the line also takes away the immunity from legislative action destroying the right to construct the same. Adirondack R. Co. v. New York, (1899) 176 U. S. 335, 20 S. Ct. 460, affirming (1899) 160 N. Y. 225, 54 N. E. 689.

Forfeiture of charter.— Where a certificate has been obtained from the Public Service Commission under this section the attorney-general cannot procure a forfeiture of the corporation charter for failure to build the part of the railroad described in the certificate. People v. Ulster, etc., R. Co., (1891) 128 N. Y. 240, 28 N. E. 635.

§ 154. Foreign railroads. All the provisions contained in the several sections of this chapter shall extend, apply to and cover the consolidation, lease, sale or reorganization of any railroad or other corporation heretofore or hereafter organized, under the laws of this state, and any other state or country, to build, lease,

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buy, sell, maintain or operate any of the lines or routes of railroads, tunnels, bridges, ferries or branches or any part thereof mentioned in this article, and any similar lines or routes of railroad, tunnels, bridges, ferries or any part thereof, constructed or to be located and constructed in any foreign country.

This section was derived from the Railroad Law of 1890, § 84, as added by L. 1895, ch. 921, § 1.

§ 155. Consolidation of domestic and foreign railroads. The consolidation of a domestic railroad corporation with a foreign railroad corporation, effected prior to March tenth, nineteen hundred and three, shall not be deemed invalid because such roads at the time of the consolidation did not form a connected and continuous line, if, when the consolidation was effected, or thereafter, an intermediate line, by purchase or by a lease of not less than ninety-nine years, became, with the consolidated roads, a continuous and connecting line of railroad.

This section was derived from L. 1903, ch. 30, § 1.

§ 156. Subject to the supervision and approval of the proper public service commission and upon such terms and conditions as the commission may prescribe, any corporation incorporated under the business corporations law prior to the first day of January, one thousand nine hundred and seventeen, owning two-thirds or more of the issued and outstanding capital stock of a railroad corporation, or of each one of two or more railroad corporations, may file in the offices of the secretary of state and of the clerk of the county in which its principal office is located, a certificate, under its corporate seal, of its intention to become a railroad corporation, with an affidavit of its secretary that the holders of more than two-thirds of its capital stock have consented to the filing of such certificate at a meeting of its stockholders held after the same notice has been given as is required for the annual meeting of stockholders of such corporation, together with certificates, under its corporate seal, of its ownership of more than two-thirds of the stock of a railroad corporation, copies of a resolution of its board of directors, certified by its secretary to be correct copies, declaring that said corporation has merged into itself such railroad corporation and of the certificates of such commission approving the merger. Thereafter such corporation may from time to time, subject to such supervision and upon obtaining such permission and approval and by filing similar certificates and a similar resolution, merge one or more other railroad corporations of each of which it owns two-thirds or more of the capital stock issued and outstanding. The provisions of sections one hundred and fifty-six, one hundred and fifty-seven, one hundred and fifty-eight and one hundred and fifty-nine as hereby enacted shall not be available

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to any business or railroad corporation which at any time after the first day of January, nineteen hundred and seventeen, shall have increased the amount of its authorized and outstanding capital stock, bonds or other evidences of indebtedness unless the prior or subsequent permission and approval thereof by the proper public service commission shall have been or shall be obtained in the manner provided by law as to a railroad corporation.

The above, together with three following provisions, numbered 157, 158 and 159, were added by L. 1917, ch. 771, § 1, in the following terms: "Article four of chapter four hundred and eighty-one, entitled 'An act in relation to railroads, constituting chapter forty-nine of the consolidated laws,' is hereby amended by inserting after section one hundred and fifty-five new paragraphs numbered one hundred and fifty-six, one hundred and fifty-seven, one hundred and fifty-eight and one hundred and fifty-nine." These "paragraphs" are preceded by the section sign, "§," and are without headings.

§ 157. If at the date of said resolution such corporation owns less than all of the capital stock of the merged corporation, such resolution shall declare the amount which in the judgment of such board of directors is the fair and reasonable value of each share of stock in the merged corporation, based upon the proportionate interest of each holder of each share of stock in all the assets of the merged corporation after deducting from such assets all debts and liabilities of such corporation. Said board of directors shall cause notice in writing to be given by registered mail to each other holder of stock in such merged corporation, stating that such merger has taken place and the value placed upon the stock, and each minority stockholder shall be entitled, upon surrender of his stock certificates, to receive payment from such merging corporation for all such stock owned by him, at the value so fixed, with interest up to the time of payment, but such interest shall cease ninety days after the mailing of said notice. If any stockholder is dissatisfied with the price so fixed, he may, within ninety days of the mailing of said notice to him, apply to the supreme court, at any special term thereof held in the district in which the principal place of business of such corporation is situated, upon eight days' notice to the corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and designate such time and place of their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholders. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such corporation, and another to such

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stockholders, if demanded; the charges and expenses of the appraisers shall be paid by the merging corporation. When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholders shall cease to have any interest in such stock and in the corporate property of the merged or merging corporation.

Added by L. 1917, ch. 771, § 1. See note to § 156, supra.

§ 158. Upon the obtaining of such permission and approval of the proper public service commission and the filing of said resolution of merger as hereinbefore provided, all the rights, privileges, immunities, exemptions and franchises of the corporation so merged, and all the property, real, personal and mixed, and all debts due or to become due, and other things in action belonging to the corporation so merged, shall be taken and deemed to be transferred to and vested in the merging corporation, without further act or deed, and they shall vest in and be held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by the merged corporation; and all claims, demands, property, rights of way, franchises, consents and every other interest shall be as effectually the property of the merging corporation as they were of the merged corporation; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested actually or contingently in the merged corporation, shall not be deemed to revert, or be in any way impaired by reason of this act, or any thing done by virtue thereof, but shall be vested in the merging corporation by virtue of such merger. Within six months after such merger, such merging corporation shall cease to be a business corporation.

Added by L. 1917, ch. 771, § 1. See note to § 156, supra.

§ 159. The rights of all creditors of and all liens upon the property of the two corporations so merged shall be preserved unimpaired, and all debts, liabilities and obligations theretofore incurred by the merged corporation shall thenceforth attach to the merging corporation and may be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings to which the merged corporation is a party shall abate or be discontinued by such merger, but may be conducted to final judgment in the name of the merged corporation, or the merging corporation may by order of the court, on motion, be substituted as a party.

Added by L. 1917, ch. 771, § 1. See note to § 156, supra.

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ARTICLE 5

Street Surface Railroads

Section 170. Street surface railroads; general provisions.
171. Consent of property owners and local authorities.
172. Consent of local authorities; how procured.
173. Condition upon which consent shall be given; sale of franchise at public auction.
174. Proceedings if property owners do not consent.
175. Percentage of gross receipts to be paid in cities or villages; report of officers.
176. Extension of route over rivers; terminus in other counties; when property owners withhold consent; supreme court may appoint commissioners.
177. Use of tracks of other roads.
178. Repair of streets; rate of speed; removal of ice and snow.
179. Within what time road to be built.
180. Motive power.
181. Rate of fare.
182. Collection of fare.
183. Construction of road in street where other road is built.
184. Abandonment of part of route.
185. Effect of dissolution of charter as to consents.
186. Corporate rights saved in case of failure to complete road; right to operate branches; conditions; former consents ratified; limitations.
187. Extensions and franchises confirmed.
188. Certain consents of local authorities confirmed.
189. Time extended for payment of percentage based on gross receipts.
190. When sand and salt may be used on tracks.
191. Road not to be constructed upon ground occupied by public buildings or in public parks.
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193. Right to cross bridge substituted for a bridge crossed for five years.
194. Protection of employees.
195. Platforms on new cars, how constructed.
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Section 199. Sale of unclaimed property.
200. Disposition of proceeds.
201. Construction of park railroads in cities having a population of one million five hundred thousand or upwards.
202. Consents of property owners.
203. Expense of construction and operation.
204. Agreements for payment of cost of construction by instalments.
205. Disposition of income.
206. Motive power.
207. Railroads in parks in New York city, by whom constructed.
208. Issue of bonds by comptroller.
209. Change of motive power authorized.
*[113. Street railroad company to share cost of highway bridge occupied by its tracks.]
[114. Commission to determine proportion after hearing.]
[115. Order.]
[116. Railroad company not liable in certain cases.]
[117. Commission to fix amounts.]
[118. Amount to be assessed and levied if not paid.]
[119. May be paid in installments in certain cases.]
[119a. Application of preceding section.]

§ 170. Street surface railroads; general provisions. The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, town or village, or in any two or more civil divisions of the state, and every such corporation must comply with the provisions of this article. Any street surface railroad corporation, at any time proposing to extend its road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the name and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches. Upon filing any such statement and upon complying with the conditions set forth in section one hundred and seventy-one of this chapter, every such corporation shall have the power

* Sections in brackets were added to Railroad Law of 1890 by L. 1910, ch. 477. They were not repealed by the Consolidated Railroad Law of 1910. See note in text preceding section 113, infra.

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and privilege to construct, extend, operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation or in such statement. Every such corporation, before constructing any part of its road upon or through any private property described in its articles of association or certificate of incorporation or statement, and before instituting any proceeding for the condemnation of any real property, shall make a map and profile of the route adopted by it upon or through any private property, which map and profile shall be certified by the president and engineer of the company, or a majority of its directors, and shall be filed in the office of the clerk of the county in which the road is to be constructed, and all provisions of section sixteen of this chapter so far as applicable shall apply to the route so located. If any such street surface railroad company is unable to agree for the purchase of any such real property, or of any right or easement therein required for the purpose of its railroad, or if the owner thereof shall be incapable of selling the same, or if, after diligent search and inquiry, the name and residence of such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation in the manner and by the proceedings provided by the condemnation law. Nothing in this section shall be deemed to authorize a street railroad corporation [1]whose railroad is mainly, upon, along, above or below streets and highways [2]to acquire real property within a city by condemnation, but nothing in this section shall apply to or affect rapid transit railways constructed, maintained or operated under any rapid transit act.

This section was derived from the Railroad Law of 1890, § 90, as amended by L. 1895, ch. 933, § 1.

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I. In General

Distinction between street railways and "commercial" railroads: see 4 Ann. Cas. 449 note; Ann. Cas. 1913C 579 note.

Street railway as carrier of passenger's effects: see 9 Ann. Cas. 201 note.

Street railway as including railway built below or above street: see 19 Ann. Cas. 260 note.

Street railway corporation as quasi public corporation: see 18 Ann. Cas. 1065 note.

Grant of street franchise as extending to new street or subsequently annexed territory: see 18 Ann. Cas. 1118 note.

Incorporation of territory into municipality as affecting prior rights to use highway: see 47 L. R. A. (N. S.) 608 note.

Right of street railway corporation to challenge powers or privileges of rival: see L. R. A. 1916B 1087 note.

[1] Words "whose railroad is mainly . . . below streets and highways," new.

[2] Remainder of section new.

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Compensation payable on purchase of street railway by municipality: see Ann. Cas. 1915B 1179 note.

Distinguishing features of street railway.—There is a wide difference between railroads organized under the general provisions of the Railroad Law and street surface railroad companies. The former are designed to serve traffic between localities while the latter are designed to serve street traffic. Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845. The chief element of a street railway is that it is built upon and passes along streets and avenues for the convenience of those living or moving thereon. Its fundamental purpose is to accommodate the street travel. Matter of South Beach R. Co., (1890) 119 N. Y. 141, 23 N. E. 486.

Railways affected.—This provision makes section 180 limiting the motive power on street railways applicable to a street railway theretofore incorporated under a special act so far as a subsequent change of motive power is concerned. People v. State Board of Railroad Com'rs, (1898) 32 App. Div. 179, 52 N. Y. S. 908, affirmed on opinion below (1899) 158 N. Y. 711, 53 N. E. 1129. This section makes section 178 applicable to street railways in the city of Utica. People v. Utica, (1899) 45 App. Div. 356, 61 N. Y. S. 31.

Subway.— This section does not apply to an underground railroad a large part of whose route is not under streets or highways. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Rapid Transit Act.—The predecessor of this and the succeeding sections was the General Surface Railway Act of 1884 which prohibited the construction of railways thereafter under the Rapid Transit Act of 1875 (§ 220 et seq.) but this prohibition was held not to apply to a railway organized under that act before the enactment of the Surface Railway Act. New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332.

Law of 1850.—A street surface railroad company might be incorporated under the General Railroad Law of 1850. Op. Atty.-Gen. (1905) 207.

Connection with elevated road.— Under this section a street surface railway cannot construct or connect with an elevated railway without proceeding as in case of an extension. Eldert v. Long Island Electric R. Co., (1898) 28 App. Div. 451, 51 N. Y. S. 186, affirmed (1901) 165 N. Y. 651 mem.

Intersection of railroads.— The crossing of a street railway over the tracks of another railroad is governed by sections 22 and 98, and not by this section. Delaware, etc., R. Co. v. Syracuse, etc., R. Co., (1899) 28 Misc. 456, 59 N. Y. S. 1035, affirmed 43 App. Div. 621, 60 N. Y. S. 386.

Carriage of freight.—This section speaks of the "conveyance of persons and property for compensation" and clearly recognizes the right of a street railway to carry freight. DeGrauw v. Long Island Electric R. Co., (1899) 43 App. Div. 502, 60 N. Y. S. 163, affirmed on opinion below (1900) 163 N. Y. 597, 57 N. E. 1108.

Construction on private property.—A corporation organized to build a street railway is not authorized to build the greater part of its line on private property. Matter of South Beach R. Co., (1890) 119 N. Y. 141, 23 N. E. 486.

Construction in park.—The fact that there is a public driveway across a park does not render the same a highway on which a railway may be constructed, but the same is a part of the park within section 191. Buffalo, etc., R. Co. v. Hoyer, (1915) 214 N. Y. 236, 108 N. E. 455, reversing 147 App. Div. 205, 132 N. Y. S. 31.

Spur track to factory.—A franchise to construct and operate a railway in a street does not authorize the construction of a spur track to a private manufacturing plant to receive and deliver freight. Brooklyn Heights R. Co. v. Steers, (1914) 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C 791.

Cited.—This section was cited in Matter of New York, (1916) 218 N. Y. 274, 112 N. E. 911, affirming 171 App. Div. 928, 155 N. Y. S. 1127, which affirmed 77 Misc. 246, 135 N. Y. S. 708; Bull v. New York City R. Co., (1908) 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. (N. S.) 778 (see § 181); Public Service Commission v. New York, etc., R. Co., (1915) 170 App. Div. 580, 156 N. Y. S. 323; People v. State Board of Tax Com'rs, (1914) 160 App. Div. 771, 146 N. Y. S. 112; Conway v. Rochester, (1897) 24 App. Div. 489, 49 N. Y. S. 244, reversed in (1898) 157 N. Y. 33, 51 N. E. 395 (see § 178); People v. Woodbury, (1911) 70 Misc. 261, 127 N. Y. S. 201.

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II. Extensions

Certificate covering several routes.— Where there is included in a certificate of extension several separate and distinct routes, unrelated to each other, each route must be deemed a separate extension. People v. Steers, (1913) 158 App. Div. 153, 143 N. Y. S. 52, affirmed (1914) 211 N. Y. 538 mem.

Time of filing statement.— It seems that the order of procedure in obtaining the right to build an extension is immaterial, so that obtaining the consent of the local authorities may precede the filing of a statement as required by this section. Roberts v. Huntington R. Co., (1907) 56 Misc. 62, 105 N. Y. S. 1031.

Transmission line as extension.—The construction of a line of poles and wires to carry electricity to a railway is not an extension of its line within this section. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791.

Objection to route.— Where a map for an extension is filed as provided in section 16, a land owner objecting to the route must proceed as provided in that section and if he fails to do so he cannot object to the route in condemnation proceedings subsequently instituted as provided by this section. Stillwater, etc., R. Co. v. Slade, (1899) 36 App. Div. 587, 55 N. Y. S. 966.

Certificate of convenience.—Where an extension of a street railway was made under this section no certificate of convenience was formerly required to be obtained under section 9 except as required in the case of parallel roads under section 10. New York Cent., etc., R. Co. v. Auburn Interurban Electric R. Co., (1904) 178 N. Y. 75, 70 N. E. 117; New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., (1904) 96 App. Div. 471, 89 N. Y. S. 418. But a railway could not, under guise of an extension, build a line which was in fact the corpus of the road, being much longer than the original road, without obtaining such a certificate. New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., (1904) 96 App. Div. 471, 89 N. Y. S. 418. The mere fact that the extension was longer than the original road was held not controlling however, where it was in reality an extension and not a new road. Roberts v. Huntington R. Co., (1907) 56 Misc. 62, 105 N. Y. S. 1031. Now, however, it seems that such a certificate is necessary under section 53 of the Public Service Commissions Law. Syracuse, etc., R. Co. v. Carrier, (1912) 149 App. Div. 411, 134 N. Y. S. 791. But the public service commission cannot refuse such a certificate because of its disapproval of the conditions on which the local authorities based their consent to the extension, as the commission has no jurisdiction over such consent. People v. Willcox, (1909) 133 App. Div. 556, 118 N. Y. S. 248, affirmed (1909) 196 N. Y. 213.

III. Condemnation Proceedings

Filing map.— The provision as to filing a map applies, so far as private property is concerned, only as to the private property sought to be acquired by condemnation, and no other person can object to an omission to file. Delaware, etc., R. Co. v. Syracuse, etc., R. Co., (1899) 28 Misc. 456, 59 N. Y. S. 1035, affirmed 43 App. Div. 621, 60 N. Y. S. 386.

Construction on street owned by abutters.—The last sentence of this section does not prohibit the acquisition of the right to operate a street railway in a city street in which the abutting owners hold the fee. Schenectady R. Co. v. Peck, (1903) 88 App. Div. 21, 84 N. Y. S. 759; Adee v. Nassau Electric R. Co., (1902) 72 App. Div. 404, 76 N. Y. S. 589, affirmed (1904) 177 N. Y. 548, 69 N. E. 1120; Schenectady R. Co. v. Lyon, (1903) 41 Misc. 506, 85 N. Y. S. 40.

Institution before procuring consents.— Condemnation proceedings instituted before the consent of local authorities has been obtained are premature. Matter of Rochester Electric R. Co., (1890) 123 N. Y. 351, 25 N. E. 381.

Attempt to agree with owners.— The fact that an attempt was made with owners to agree as to the purchase of their lands precludes condemnation proceedings under this section, and the unwilling state of minds of the owners shown on the trial does not obviate the objection. Schenectady R. Co.

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v. Lyon, (1903) 41 Misc. 506, 85 N. Y. S. 40. Where there are infants claiming an interest in the lands sought to be acquired, though an adult claims sole ownership, an effort to purchase before instituting condemnation proceedings is unnecessary under this section. Stillwater, etc., R. Co. v. Slade, (1899) 36 App. Div. 587, 55 N. Y. S. 966.

Cited.—This section was cited in Op. Atty.-Gen. (1897) 159, on the question of change of motive power. See infra, § 180 note.

§ 171. Consent of property owners and local authorities. A street surface railroad, or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing acknowledged or proved as are deeds entitled to be recorded, of the owners in cities and villages of one-half in value, and in towns, not within the corporate limits of a city or village, of the owners of two-thirds in value, of the property bounded on and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, extension or branch shall have been first obtained. Such consents of property owners in the county of Kings which shall be hereafter executed, may be forfeited unless within sixty days after the execution thereof, the same shall be recorded in the office of the register of such county. Such register is hereby directed upon the payment of the proper fees to record all consents left with him for that purpose in books to be provided by him and paid for out of the funds provided to meet the expenses of said office. Such books shall be indexed according to the names of the consenting property owners and also according to the names of the streets, roads or other highways upon which the property to which the consent relates shall be bounded. In case the recording of such consents shall be hindered, delayed or prevented by legal proceedings in any court or from any other or different cause not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hinderance, delay or prevention. The consents of property owners in one city, village or town, or in any other civil division of the state, shall not be of any effect in any other city, village or town or other civil divisions of the state. Consents of property owners heretofore obtained to the building, extending, operating or change of motive power shall be effectual for the purposes herein mentioned and may be deemed to be sufficiently proved and shall be entitled to be recorded, wherever such consents shall have been signed, executed or acknowledged before an officer authorized by law to take acknowledgments of deeds, or before or in the presence of a subscribing witness, and without regard to whether or not the subscribing witness shall have affixed his signature in the presence of the subscriber, provided that the proof of such signing, execution or acknowledgment shall have been made by such

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subscribing witness in the manner prescribed by section three hundred and four of the real property law. In cities the common council, acting subject to the power now possessed by the mayor to veto ordinances; in villages the board of trustees; and in towns the superintendent of highways and the town board shall be the local authorities referred to, except that in villages where the control of the streets is vested in any other board or authorities, such other board or authorities shall be the local authorities referred to, and the consent of such other board or authorities hereafter or heretofore obtained shall be sufficient; if in any city or county the exclusive control of any street, avenue or other property which is to be used or occupied by any such railroad, extension or branch, is vested in any other authority, the consent of such authority shall also be first obtained. The value of the property above specified shall be ascertained and determined by the assessment-roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent, except property owned by such city, village or town, or by the state of New York, or the United States of America, the value of which shall be ascertained and determined by making the value thereof to be the same as is shown by such assessment-roll to be the value of the equivalent in size and frontage of the adjacent property on the same street or highway; and the consent of the local authorities shall operate as consent of such city, village or town as the owners of such property. Whenever heretofore or hereafter a railroad has been or shall be constructed and put in operation for one year or the motive power thereof has been or shall be changed and put in operation for a similar length of time, such facts shall be presumptive evidence that the requisite consents of local authorities, property owners and other authority to the construction, maintenance and operation of such railroad or change of motive power have been duly obtained. No consent of local authorities given prior to May second, nineteen hundred and one, shall be deemed invalid because of any portion of the road or route consented to not being connected with an existing road or route of the corporation obtaining or acquiring such consent and all statements of extension filed under section one hundred and seventy of this article in reference to the route or part thereof described in any consent of local authorities are hereby ratified and confirmed, whether the same were filed before or after the obtaining or acquiring of such consents, provided, however, that nothing herein contained shall be construed to affect any portion of a street surface railroad which is now in or upon any portion of a street which is under the jurisdiction of a park department in any city containing a population of over twelve hundred thousand inhabitants.

This section was derived from the Railroad Law of 1890, § 91, as amended by L. 1907, ch. 156, § 1.

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I. In General

Street surface railway.— The provisions of this section apply to all street surface railway companies. Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845.

Subway.— This section does not apply to an underground railway a large part of whose route is not under streets or highways. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Construction of or connection with elevated road.—A consent to a street surface railway does not authorize the construction of or connection with an elevated railway. Eldert v. Long Island Electric R. Co., (1898) 28 App. Div. 451, 51 N. Y. S. 186, affirmed (1901) 165 N. Y. 651 mem.

Consents as inuring to prior franchise.— The fact that a railway has been incorporated to construct a road on certain streets and has filed a map of its routes does not entitle it to any benefit from consents thereafter given to the construction of another road on such streets, and where it has never procured the requisite consents it has no contractual rights entitled to protection under the constitution. Underground R. v. New York, (1903) 193 U. S. 416, 24 S. Ct. 411, 48 U. S. (L. ed.) 733, affirming 116 Fed. 952.

Transfer of franchise to individual.—A street railway which has in fact abandoned the use of its railway cannot transfer its franchise to an individual and enable him to use the same exclusively for his own private purposes. Fanning v. Osborne, (1886) 102 N. Y. 441, 7 N. E. 307.

Consent to compulsory traffic arrangement.—Where a street railway seeks to acquire the right to use the tracks of another railway by compulsory proceedings under section 183 the consent of the local authorities and abutting owners must first be obtained under this section. Colonial City Traction Co. v. Kingston City R. Co., (1897) 154 N. Y. 493, 48 N. E. 900, affirming on reargument (1897) 153 N. Y. 540, 47 N. E. 810, which affirmed 15 App. Div. 195, 44 N. Y. S. 732.

Consents to compulsory crossing.— The obtaining of the consents required by this section is a condition precedent to the right to acquire by condemnation a right to cross the tracks of a railroad company. Matter of Saratoga Electric R. Co., (1890) 58 Hun 287, 12 N. Y. S. 318.

Abutting owners holding fee.— This section applies to streets in which the abutting owners hold the fee. Schenectady R. Co. v. Peck, (1903) 88 App. Div. 201, 84 N. Y. S. 759; Adee v. Nassau Electric R. Co., (1902) 72 App. Div. 404, 76 N. Y. S. 589, affirmed (1904) 177 N. Y. 548, 69 N. E. 1120; Matter of New York, (1916) 218 N. Y. 274, 112 N. E. 911, affirming 171 App. Div. 928, 155 N. Y. S. 1127, which affirmed 77 Misc. 246, 135 N. Y. S. 708; Brooklyn Heights R. Co. v. Steers, (1914) 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C 791 (see § 170); Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1066, reversing 123 App. Div. 93, 108 N. Y. S. 255 (see § 170); Stern v. International R. Co., (1915) 167 App. Div. 503, 153 N. Y. S. 520 (per Lambert, J., dissenting); People v. State Board of Tax Com'rs, (1914) 160 App. Div. 771, 146 N. Y. S. 112; Rochester Telephone Co. v. Ross, (1908) 125 App. Div. 76, 109 N. Y. S. 381, affirmed (1909) 195 N. Y. 429; Matter of Keeseville, etc., R. Co., (1906) 116 App. Div. 72, 101 N. Y. S. 237; Heerwagen v. Crosstown St. R. Co., (1904) 90 App. Div. 275, 86 N. Y. S. 218.

Cited.— This section was cited in Matter of Rochester, etc., R. Co., (1900) 51 App. Div. 65, 64 N. Y. S. 429 (see sec. 180); Central Crosstown R. Co. v. Metropolitan St. R. Co., (1897) 16 App. Div. 229, 44 N. Y. S. 752 (per Ingraham, J., dissenting); O'Brien v. Buffalo Traction Co., (1898) 52 N. Y. S. 322.

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II. Consent of Abutting Owners

Proceedings if property owners do not consent: see infra, § 174.

Effect of dissolution of charter as to consents: see infra, § 185.

Constitutional restriction as to consent of owners: see Constitution, art. III, § 18.

Right of abutting owner to enjoin railroad from laying tracks in street without paying or securing compensation: see 13 Ann. Cas. 23 note, Ann. Cas. 1913E 874 note.

Unit for purposes of consent.— For the purpose of consenting the property owners on each street form a unit and the requisite consents must be on each street, and the streets cannot be grouped to determine whether the required consents have been obtained. Manhattan Bridge Three-Cent Line v. Brooklyn Heights R. Co., (1913) 159 App. Div. 567, 144 N. Y. S. 523, affirming 78 Misc. 220, 139 N. Y. S. 216.

Valuation of property.— In determining the valuation of property for the purpose of ascertaining whetner the necessary consents have been obtained the value of each entire parcel of land, of whatever depth with the buildings thereon, bounding on the street, as shown on the last assessment roll is final and conclusive. Fox v. New York City Interborough R. Co., (1906) 112 App. Div. 832, 98 N. Y. S. 338, reversing 48 Misc. 162, 95 N. Y. S. 251, appeal dismissed (1906) 186 N. Y. 524, 78 N. E. 1103.

Tracks turning corner.— In the case of a street railway turning a corner from one street to another, the property on the four corners all should be taken into account in determining whether the requisite consents have been obtained. Sea Beach R. Co. v. Coney Island, etc., R. Co., (1897) 22 App. Div. 477, 47 N. Y. S. 981.

Public square or park.—The corresponding section of the Railroad Act of 1890 provided that in case of a street bounded on one side by a public square or park the consent of one-half the owners on the opposite side should be obtained. L. 1894, c. 723, declared the section "amended as follows" and among other things omitted this provision, which was held thereby to be repealed. McDermott v. Nassau Electric R. Co., (1895) 85 Hun 422, 32 N. Y. S. 884, affirmed (1895) 147 N. Y. 700, 42 N. E. 724.

Consent given to individual.— Consents of property owners given to an individual and by him assigned to a corporation subsequently organized by him are valid and effectual. Geneva, etc., R. Co. v. New York Cent., etc., R. Co., (1900) 163 N. Y. 228, 57 N. E. 498, reversing 24 App. Div. 335, 48 N. Y. S. 842.

Effect of inability to procure consent on one street.—The fact that the owners on some other street have not or will not consent does not affect the right to procure a franchise on a street on getting the required consents on that street. Manhattan Bridge Three-Cent Line v. Brooklyn Heights R. Co., (1913) 159 App. Div. 567, 144 N. Y. S. 523, affirming 78 Misc. 220, 139 N. Y. S. 216.

Effect of sale of property.—A consent of a property owner, once given, is irrevocable and even though the property is sold to a bona fide purchaser before the record of the consent it is nevertheless effective, though in such a case the purchaser may be entitled to compensation for his damages. Adee v. Nassau Electric R. Co., (1901) 65 App. Div. 529, 72 N. Y. S. 992, affirmed (1902) 173 N. Y. 580, 65 N. E. 113; Carswell v. Hudson Val. R. Co., (1910) 68 Misc. 393, 125 N. Y. S. 24.

Burden of proving defect.—Where the requisite consents have been recorded the burden is on one attacking the same as defective to prove the defect. Adee v. Nassau Electric R. Co., (1901) 65 App. Div. 529, 72 N. Y. S. 992, affirmed (1902) 173 N. Y. 580, 65 N. E. 1113.

III. Consent of Local Authorities

1. *In General*

Franchise as property.—"No doubt the consent of the local authorities may be withheld or granted on specified conditions but when given the special franchise, so called, becomes property protected by the constitution and, except for conditions attached to the consent, subject to regulation only under

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the police power." People v. Western New York, etc., Traction Co., (1915) 214 N. Y. 526, 108 N. E. 847.

Franchise to individual.— The statute does not require that the holder of a franchise shall be a corporation, and a consent of local authorities to an individual is valid. Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1066, reversing 123 App. Div. 93, 108 N. Y. S. 255; Trojan R. Co. v. Troy, (1908) 125 App. Div. 362, 109 N. Y. S. 779, affirmed (1909) 195 N. Y. 614, 89 N. E. 1113.

Motives in granting franchise.—The courts cannot inquire into the motives of members of the council of a city in granting consent under this section. Kittinger v. Buffalo Traction Co., (1899) 160 N. Y. 377, 54 N. E. 1081; Adamson v. Nassau Electric R. Co., (1895) 89 Hun 261, 34 N. Y. S. 1073.

Proof of consent.— In a proceeding by a street railway to acquire the right to cross a railroad in a town proof of the consent of the local authorities in that town is all that is necessary to show its right to operate its road. Geneva, etc., R. Co. v. New York Cent., etc., R. Co., (1900) 163 N. Y. 228, 57 N. E. 498, reversing 24 App. Div. 335, 48 N. Y. S. 842.

2. *Necessity for Consent*

Consolidation.—A special statute providing for the consolidation of existing corporations which does not require the consent of the local authorities is not objectionable as the provisions applicable to the constituent corporations are sufficient for that purpose. Bohmer v. Haffen, (1900) 161 N. Y. 390, 55 N. E. 1047, affirming 35 App. Div. 381, 54 N. Y. S. 1030.

Highway crossing.—The consent of the local authorities to the construction of a street railway, running in the particular town on a private way, across a highway is essential, and proceedings cannot be taken under section 21. In re Syracuse, etc., R. Co., (1900) 33 Misc. 510, 68 N. Y. S. 881.

Connection of roads.—The consent of local authorities is not essential to the connection of two railroads under section 22. Gallagher v. Keating, (1899) 27 Misc. 131, 58 N. Y. S. 366, affirmed (1899) 40 App. Div. 81.

Traffic agreement.— Consent of local authorities is not required to a traffic agreement giving one company the right to use the tracks of another under section 148. Gallagher v. Keating, (1899) 27 Misc. 131, 58 N. Y. S. 366, affirmed (1899) 40 App. Div. 81.

3. *Who Are Local Authorities*

In general.— By the term "local authorities" is meant "those officers on whom the administration of the government of the particular subdivision of the state, by virtue of their office, devolves, in relation to the subject matter of the legislative provision." Matter of Rochester Electric R. Co., (1890) 123 N. Y. 351, 25 N. E. 381, quoted in Pawling v. New York, etc., R. Co., (1911) 144 App. Div. 791, 129 N. Y. S. 643; Lyslander v. Syracuse, etc., R. Co., (1900) 31 Misc. 330, 65 N. Y. S. 415, affirmed on opinion below 51 App. Div. 617, 66 N. Y. S. 1146.

County superintendent of highways.—The consent of the superintendent of highways was held to be required in the county of Richmond notwithstanding L. 1890, ch. 555, vesting control of highways in the board of supervisors for certain purposes. Gaedeke v. Staten Island Midland R. Co., (1899) 43 App. Div. 514, 60 N. Y. S. 598.

Commissioner of street improvements.—A commissioner of street improvements in the city of New York has been held not vested with such exclusive control of streets as to require his consent in addition to that of the local authorities. Bohmer v. Haffen, (1900) 161 N. Y. 390, 55 N. E. 1047, affirming 35 App. Div. 381, 54 N. Y. S. 1030.

Park commissioners.— While the consent of park commissioners having exclusive control of a street is required by this section they are not the local authorities referred to in this section, and their consent is valid though imposing more rigorous terms on the street railway than are imposed by the common council. Kuhn v. Knight, (1907) 190 N. Y. 339, affirming 115 App. Div. 837, 101 N. Y. S. 1, affirming 51 Misc. 216, 99 N. Y. S. 986.

Turnpike company.— Before the statutory definition of local authorities

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in towns was added it was held that the town authorities (i. e. the commissioners of highways) having charge of highways were intended, and that a turnpike company was not a local authority whose consent, as to its road, was sufficient. Matter of Rochester Electric R. Co., (1890) 123 N. Y. 351, 25 N. E. 381.

Bridge in village.— In the case of a bridge within a village, the maintenance and repair of which is a joint charge on two towns and under the control of their superintendents of highways, such superintendents, and not the village trustees, are the local authorities whose consent is required. Lyslander v. Syracuse, etc., R. Co., (1900) 31 Misc. 330, 65 N. Y. S. 415, affirmed on opinion below 51 App. Div. 617, 66 N. Y. S. 1146.

4. *Manner of Giving Consent*

Joint action of legislative bodies.—Where the charter of a city provides that no action by the common council, consisting of two bodies, shall be valid unless originating in one body and subsequently approved in the other, but provides for the election of certain officers in joint session, a consent under this section should be given in the regular manner, and need not be in joint session. Kittinger v. Buffalo Traction Co., (1899) 160 N. Y. 377, 54 N. E. 1081. And see Matter of Buffalo Traction Co., (1898) 25 App. Div. 447, 49 N. Y. S. 1052, affirmed (1898) 155 N. Y. 700, 50 N. E. 1115.

Approval of mayor.—Where the mayor is required to approve or reject an ordinance his action in writing to the council suggesting certain amendments, not accompanied by a return of the ordinance, does not preclude his subsequent approval of the consent as given. Kittenger v. Buffalo Traction Co., (1899) 160 N. Y. 377, 54 N. E. 1081.

5. *Imposing Conditions*

Power of municipality.— "The municipal authorities have the absolute power to grant or withhold their consent to the construction of street railways; and they may impose any conditions, however onerous and difficult to perform, which seem to them, in the exercise of their discretion, to be proper, as the terms upon which their consent will be given." People v. Barnard, (1888) 110 N. Y. 548, 18 N. E. 354. The local authorities may impose such conditions on their consent as they see fit if the conditions do not contravene any statute nor relate to matters within the jurisdiction of another body. Abraham v. Meyers, (1893) 29 Abb. N. Cas. 384, 23 N. Y. S. 225, 228. See also Delaware, etc., R. Co. v. Oswego, (1904) 92 App. Div. 551, 86 N. Y. S. 1072; Op. Atty.-Gen. (1905) 207. But where the consent of the municipality is void for lack of authority to give it, conditions thereby imposed on the railroad company are also void. Potter v. Collis, (1898) 156 N. Y. 16, 50 N. E. 413; Op. Atty.-Gen. (1905) 207.

Power of legislature.—The legislature cannot dictate the conditions on which the consent of local authorities shall be given as they derive their power to consent from Const. art. 3, sec. 18, though it may impose such conditions upon the grant of a franchise as it sees fit. People v. Willcox, (1909) 133 App. Div. 556, 118 N. Y. S. 248, affirmed (1909) 196 N. Y. 213.

License fee for cars.— The local authorities may make their consent on such conditions as they see fit, and may make it conditional on the payment of a license fee for each car that runs on the road. New York v. Eighth Ave. R. Co., (1890) 118 N. Y. 389, 23 N. E. 550.

Forfeiture of deposit.— It seems that a village may require a deposit as a condition of a franchise to insure the building of the road and that a stipulation that a deposit of ten thousand dollars shall be deemed liquidated damages is not unreasonable. Peekskill, etc., R. Co. v. Peekskill, (1897) 21 App. Div. 94, 47 N. Y. S. 305.

Time of completion of road.— The local authorities may make their consent conditional on a completion of the road in a shorter time than required by the general law, and also on the execution of a bond as a condition precedent, and where the bond is not given the consent is not operative. South Shore Traction Co. v. Brookhaven, (1907) 116 App. Div. 749, 102 N. Y. S. 75. Where a consent is conditioned on the completion of the road within

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a certain time unless delayed by injunction, legal proceedings or any cause beyond the control of the railroad, the exception contemplates delay by acts not in the contemplation of the parties and does not include delay through failure to procure the consent of property owners. Manton v. South Shore Traction Co., (1907) 121 App. Div. 410, 106 N. Y. S. 82. And see Dusenberry v. New York, etc., Traction Co., (1899) 46 App. Div. 267, 61 N. Y. S. 420.

Specifying conditions on auction sale.— Where the consent of a municipality is required to be sold at auction under section 173 the municipality must specify the terms of its consent in the notice of sale and cannot impose additional conditions not specified. People v. Barnard, (1888) 110 N. Y. 548, 18 N. E. 354.

Transfers.— The local authorities may impose a condition that the railway shall carry for a single fare for one continuous passage to a point beyond the termini of the railway, and the holder of the franchise must comply with the condition or subject itself to a forfeiture. People v. Barnard, (1888) 110 N. Y. 548, 18 N. E. 354.

Relocation of tracks.— Where no such condition has been attached to a franchise the city cannot compel a relocation of the railway's tracks. People v. New York Rys. Co., (1916) 217 N. Y. 310, 112 N. E. 49. It seems that in some cases, however, a relocation may be required under section 21. Op. Atty.-Gen. (1908) 204.

Paving.— A consent may be conditioned on the macadamizing of the railroad area on the macadamizing of the highway. Op. Atty.-Gen. (1908) 201.

What constitutes violation of conditions.— Where a railway has obtained consent to occupy a highway for a distance of five miles on agreed conditions it cannot thereafter change its route and occupy but a short distance of the highway under the consent which was given. Collins v. Amsterdam St. R. Co., (1902) 76 App. Div. 249, 78 N. Y. S. 470.

Forfeiture for violation.— A provision that for violation of conditions the company "shall forfeit all privileges and rights" is not self-executing. In order to be effective the forfeiture must be judicially declared. Op. Atty.-Gen. (1905) 207.

Action to annul franchise.— For a failure to repair on notice as required by this section an action to annul the franchise may be brought by the state. Op. Atty.-Gen. (1906) 233.

IV. Presumptions

In general.— Under this section where a railway has been operated in a street for more than a year there is a presumption that the requisite consents were given. Carswell v. Hudson Val. R. Co., (1910) 68 Misc. 393, 125 N. Y. S. 24.

Third rail in highway.— The presumption of consent created by this section does not authorize a presumption that the maintenance of a charged third rail in the highway at a crossing was consented to. Blass v. Oneida R. Co., (1914) 162 App. Div. 200, 147 N. Y. S. 728.

Wires in streets.— Where a street railway has maintained electric wires in a street for more than one year there is a presumption that they are rightfully there. Hallis v. Brooklyn Heights R. Co., (1908) 128 App. Div. 821, 113 N. Y. S. 4.

Change of motive power.— Where a railway has been operated in the street for many years by electricity the consent of abutters to a change of power to electricity will be presumed. Stern v. International R. Co., (1917) 220 N. Y. 284, 115 N. E. 759, affirming 167 App. Div. 503, 153 N. Y. S. 520.

§ 172. Consent of local authorities; how procured. The application for the consent of the local authorities shall be in writing and before acting thereon such authorities shall give public notice thereof and of the time and place when it will first be considered, which notice shall be published daily in any city for at least fourteen days in two of its daily newspapers if there be

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two, if not, in one, to be designated by the mayor, and in any village or town for at least fourteen days in a newspaper published therein, if any there shall be, and if none, then daily in two daily newspapers if there be two, if not, one published in the city nearest such village or town. Such consent must be upon the expressed condition that the provisions of this article pertinent thereto shall be complied with, and shall be filed in the office of the clerk of the county in which such railroad is located. Whenever the consent of the common council of a city is applied for, the first consideration, of which notice is hereby required, may be by committee of such common council. Any such notice, publication or consideration heretofore or hereafter given, made or had in substantial conformity with the requirements of this section, is and shall be sufficient notice, publication and consideration for all the purposes hereof notwithstanding any conflicting provision of any local or special act or charter.

This section was derived from the Railroad Law of 1890, § 92, as amended by L. 1893, ch. 434, § 1.

Conditions to consent: see supra, section 171.

Subway.— This section does not apply to an underground railway a large part of whose route is not under streets or highways. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 85 N. E. 1113.

Public hearing.— While not expressly so providing this section contemplates a public hearing at which interested parties shall have a fair and reasonable opportunity to be heard, and when such a hearing is had the statute is complied with. Secor v. Pelham Manor, (1896) 6 App. Div. 236, 39 N. Y. S. 993.

Hearing before committee.— Even before express provision was made it was held that the first consideration might be had before a committee. Abraham v. Meyers, (1893) 29 Abb. N. Cas. 384, 23 N. Y. S. 225, 228. It seems that a change in the membership of a committee after hearings have been had does not render void a consent subsequently given. Seccomb v. Wurster, (1897) 83 Fed. 856.

Publication of notice.— Within the meaning of this section a paper is published where it is circulated and given out to the public, and a paper may be deemed published in a village where that is the place of business of its publishers, and the place where it is mailed and circulated though it is printed elsewhere. Secor v. Pelham Manor, (1896) 6 App. Div. 236, 39 N. Y. S. 993. The statute recognizes the fact that villages ordinarily do not have daily papers published therein, and daily publication is not required; publication once a week for fourteen days is all that is required. Secor v. Pelham Manor, (1896) 6 App. Div. 236, 39 N. Y. S. 993.

Consent to individual.— The consent which local authorities may give is not limited to a consent to a corporation, and a consent to an individual is valid. Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1036, reversing 123 App. Div. 93, 108 N. Y. S. 255; Trojan R. Co. v. Troy, (1908) 125 App. Div. 362, 109 N. Y. S. 779, affirmed (1909) 195 N. Y. 614, 89 N. E. 1113.

Certificate of convenience.— Proceedings under this section may be taken before the railroad procures a certificate of convenience under section 9. McWilliams v. Jewett, (1895) 14 Misc. 491, 36 N. Y. S. 620.

Term of franchise.— Section 73 of the charter of the city of New York prohibited the granting of franchises for a term exceeding twenty-five years, and this prohibition was held to extend to a consent by the board of aldermen of the city of Brooklyn after the passage of the act on an application previously made. Seccomb v. Wurster, (1897) 83 Fed. 856; Norris v. Wurster, (1897) 23 App. Div. 124, 48 N. Y. S. 656.

Consent to opening street.— A consent by a city official to the opening of a street to protect water mains on a connection of railroads under section 22

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is not a consent within this section. Gallagher v. Keating, (1899) 27 Misc. 131, 58 N. Y. S. 366, affirmed (1899) 40 App. Div. 81.

Provisions as to alienation of property.— The provisions of law applicable to an alienation of city property do not apply to a consent to a franchise under this section. Abraham v. Meyers, (1893) 29 Abb. N. Cas. 384, 23 N. Y. S. 225, 228.

New York city.— Section 74 of the Greater New York charter, containing more stringent requirements as to notice and a public hearing, has been held to be a substitute for, and a repeal pro tanto of, this section so far as that city is concerned so that both provisions need not be complied with. Schieffelin v. McClellan, (1909) 135 App. Div. 665, 120 N. Y. S. 215, appeal dismissed (1910) 197 N. Y. 610, 91 N. E. 1120.

Waiver of conditions.— Where the consent of local authorities has been granted on condition that the road shall be constructed within a certain time, if it is not so completed the consent becomes inoperative and the local authorities cannot thereafter waive the condition as to time, but must proceed as in case of granting an original consent. Manton v. South Shore Traction Co., (1907) 121 App. Div. 410, 106 N. Y. S. 82.

Cited.— This section was cited in Brooklyn Heights R. Co. v. Steers, (1914) 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C 791 (see § 170); Adamson v. Nassau Electric R. Co., (1895) 89 Hun 261, 34 N. Y. S. 1073 (see § 171).

§ 173. Condition upon which consent shall be given; sale of franchise at public auction. The consent of the local authorities in any city of the first class must contain the condition that the right, franchise and privilege of using any street, road, highway, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking in such form and amount and with such conditions and sureties as may be required and approved by the comptroller or other chief fiscal officer of the city, for the fulfillment of such agreement and for the commencement and completion of its railroad within the time designated by law and for the performance of such additional conditions as the local authorities in their discretion may prescribe. Whenever such consent shall provide for the sale at public auction of the right to construct and operate a branch or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension and over the line of road which shall have applied therefor; and further, that if such right shall be purchased by any corporation other than the applicant, the gross receipts from joint business shall be divided in the proportion that the length of such extension or branch so sold shall bear to the entire length of the road whether owned or leased which shall have applied therefor and of such branch or extension, and that if such right shall be purchased by the applicant, the percentage to be paid shall be calculated on such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension or branch shall bear to the entire length of its road, whether owned or leased. The bidder to which such right, franchise and privilege may be sold must be a duly incorporated railroad corporation of this state,

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organized to construct, maintain and operate a street railroad in the city for which such consent may be given; but no such corporation shall be entitled to bid at such sale unless at least five days prior to the day fixed for such sale, or five days prior to the day to which such sale shall have been duly adjourned, the corporation shall have filed with the comptroller or other chief fiscal officer of the city, a bond in writing and under seal, with sufficient sureties, to be approved by such comptroller or officer, conditioned that if such right, franchise and privilege shall be sold to such corporation, to pay to the city where such railroad is situated the sum of fifty thousand dollars as liquidated damages and not by way of penalty in the event of the failure of such bidder to fulfill the terms of sale, comply with the provisions of this article pertinent thereto, and complete and operate its railroad according to the plan or plans and upon the route or routes fixed for its construction within the time hereinafter designated for the construction and completion of its railroad, and also conditioned to pay to the corporation first applying for the consent, if it shall not be the successful bidder, the necessary expenses incurred by such corporation prior to the sale pursuant to the requirements and direction of the local authorities, within twenty days after such sale and upon the certificate of the comptroller or other officer conducting the same as to the sum or amount to be paid. Notice of the time, place and terms of sale, and of the route or routes to be sold, and the conditions upon which the consent of the local authorities to the construction, operation and extension of such street railroad will be given, must be published by such local authorities for at least three successive weeks, at least three times a week in two daily newspapers of the city to be designated by the mayor. The comptroller or other chief fiscal officer of the city shall attend and conduct such sale and may adjourn the same from time to time, but not more than four weeks in all, unless further adjournments should, in his discretion, be necessary by reason of the pendency of legal proceedings, and shall cancel any bid if in excess of the gross receipts, leaving in force the highest bid not in excess, or if the bidder shall not have furnished adequate security entitling such bidder to bid, or shall otherwise fail to comply with the terms and conditions of sale, and shall resell the consent and license in the same manner as hereinbefore provided for the first sale. The bidder who may build and operate such railroad shall at all times keep accurate books of account of the business and earnings of such railroad, which books shall at all times be subject to the inspection of the local authorities. In the event of the failure or refusal of the corporation operating or using such railroad to pay the rental or percentages of gross earnings agreed upon, and after notice of not less than sixty days to pay the same, the local authorities interested therein may apply to any court having jurisdiction upon at least twenty

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days' notice to such corporation, and after it shall have had an opportunity to be heard in its defense, for judgment declaring the consent and right to operate and use such railroad forfeited and authorizing the sale again of the same in the manner hereinbefore prescribed, provided, however, that no such resale of any such consent and right heretofore granted shall be authorized except upon the condition that the same shall be subject to all liens and incumbrances existing on said railroads at the time such forfeiture may have been declared. All consents hereafter given by the local authorities, unless it be otherwise provided in such consent or in some renewal thereof, may be forfeited at the expiration of two years thereafter. The board of sinking fund commissioners of any city shall have power to reduce, compromise or release any obligation or liability to the mayor, aldermen and commonalty of such city under the provisions of chapter six hundred and forty-two of the laws of eighteen hundred and eighty-six, or of this chapter, whenever, in the opinion of such board, such release or compromise shall be just or equitable, or for the public interest, the reason for any such release or compromise to be stated in the recorded proceedings of such board. No lease by any company organized under section five of this chapter and owning a right, privilege or franchise of using any street, avenue, highway or public place for railroad purposes, which was sold prior to May, nineteenth, nineteen hundred and eight, under the provisions of this section, made after said date to any street surface railroad company which is not subject to the payment of any percentage pursuant to this section, and which is not organized for the purpose of operating a railroad in a city of the first class, shall be valid until the lessee company shall have filed in the office of the secretary of state and in the office of the clerk of the county where its certificate of incorporation is filed, its acceptance in writing and under its corporate seal of the provisions of this section as now amended; and upon such acceptance being filed, the total percentage amount thereafter to be paid annually under this section and under section one hundred and seventy-five of this chapter, shall be at the rate of five per centum of the gross receipts derived from the operation of the roads of the lessor and lessee companies considered as one system. The lessee company, at the time of filing its acceptance aforesaid, shall also file in the same offices a bond to the people of the state, executed in duplicate by it and a surety company authorized by law to act as surety on bonds and undertakings, in the penal sum of fifty thousand dollars, and conditioned for the faithful payment annually of the total percentage aforesaid, and such bond shall be deemed to be a full compliance with the condition for a bond or undertaking required by this section to be provided for in the conditions of the consent of the local authorities and shall supersede any such bond or undertaking theretofore given. Whenever it shall be desired to

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unite two street surface railroad routes at some point not over one-half mile from such respective lines or routes, and establish by the construction of such connection a new route for public travel, and the corporation or corporations owning or using such railroads shall consent to operate such connection as a part of a continuous route for one fare, and it shall appear to the local authorities that such connection can not be operated as an independent railroad without inconvenience to the public, but that it is to the public advantage that the same should be operated as a continuous line or route with existing railroads, or whenever for the purpose of connecting with any ferry or railroad depot, it shall be desired to construct an extension or branch not more than one-half mile in length, of any street surface railroad corporation, no sale of such franchise shall be made as provided in this section, but any consent of the local authorities for the construction and operation of such connection, extension or branch shall provide that the corporation or corporations operating such connection, extension or branch shall pay into the treasury of said city annually the percentage provided for extensions or branches in section one hundred and seventy-five of this chapter, for the purposes, at the times, in the manner and upon the conditions set forth in such section. Nothing herein contained shall be construed as superseding, repealing or modifying any provision of the charter of any city, village or town, nor as modifying or affecting the terms of a certain contract bearing date January first, eigtheen hundred and ninety-two, entered into by and between the city of Buffalo and the various street surface railroad corporations therein named in said contract, nor as modifying or affecting the terms of a certain contract bearing date the twenty-fifth day of February, eighteen hundred and ninety, entered into by and between the city of Rochester and the street surface railroad corporation therein named, nor as modifying or affecting any contract heretofore entered into between a street surface railroad corporation and any city of the third class, town or village regulating the payment of precentages or paving of streets, and any city of the third class, town or village, is hereby authorized to enter into any such form of contract with any street surface railroad corporation, and any such contract entered into before said date is hereby ratified and confirmed. The local authorities may, in their discretion, make their consent to depend upon any further conditions respecting other or further security, or deposit, suitable to secure the construction, completion and operation of the railroad within any time not exceeding the period prescribed in this article and respecting the character, quality or motive power of the road to be completed and respecting the grouping of streets, avenues and highways into one route, or into several routes, for the purpose of a single sale of the franchise, right or privilege for all the routes collectively, or of the separate sale for each route or

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street, as said local authorities may think expedient, and respecting the payment of the percentage agreed to be paid at the sale upon all the lines operated by the successful bidder within the city and respecting any matter involved in or affecting the computation of percentage payments and respecting the use of the railroads to be constructed under the consent by any other company and respecting the interchange of traffic and division of fares between the company operating such railroads and any other company, and respecting the application of any provision herein contained as to carriage of passengers for single fare and the division of gross receipts and the payment of percentages to the line leased or operated under contract by the applicant for an extension, and also respecting any other matter concerning which, in their judgment, further conditions would be for the public interest. Nothing herein contained shall apply to, or affect any grant hereafter made under the provisions of title one, chapter three of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven and the amendments thereto known as the Greater New York charter.

This section was derived from the Railroad Law of 1890, § 93, as amended by L. 1901, ch. 494, § 1.

Subway.— This section does not apply to an underground railway a large part of whose route is not under streets or highways. New York, etc., R. Co. v. O'Brien, (1907) 121 App. Div. 819, 106 N. Y. S. 909, affirmed on opinion below (1908) 192 N. Y. 558, 83 N. E. 1113.

Certificate of convenience.— Obtaining a certificate of convenience under section 9 is not a condition to becoming a bidder at a sale under this section. Matter of Empire City Traction Co., (1896) 4 App. Div. 103, 38 N. Y. S. 963.

Bond of bidder.— Where the local authorities have not prescribed additional conditions to be inserted in the bond to be given by the bidder it seems that the fiscal officer can require a bond only conditioned on payment of the percentage of the gross receipts and the timely commencement and completion of the road, and where a bond containing such conditions and with a penalty and sureties approved by him is presented the fiscal officer must accept the same. People v. Barnard, (1888) 110 N. Y. 548, 18 N. E. 354.

Cities within section.— Formerly the provisions of this section as to the sale of franchises at auction were limited to cities having a population of twelve hundred and fifty thousand or more and were not applicable to the city of Buffalo. Kuhn v. Knight, (1907) 190 N. Y. 339, 83 N. E. 293, affirming 115 App. Div. 837, 101 N. Y. S. 1, affirmed 51 Misc. 216, 99 N. Y. S. 986. Some city charters contain similar provisions as to the sale of franchises. Trojan R. Co. v. Troy, (1908) 125 App. Div. 362, 109 N. Y. S. 779, affirmed (1909) 195 N. Y. 614, 89 N. E. 1113.

Requirement of additional security.— The provision of this section that the local authorities may make their consent conditional on the giving of other and further security has been held to apply to all cities, villages and towns. South Shore Traction Co. v. Brookhaven, (1907) 116 App. Div. 749, 102 N. Y. S. 75.

Contract as to paving.— The provision that any city of the third class, town or village is authorized to enter into a contract regulating the paving of streets gives to such cities, towns and villages "a free hand and power to contract to the exclusion of all general laws on the subject, and to the exclusion of all burdens imposed by general laws," including section 178, and validates previous contracts so entered into. Davidge v. Binghamton, (1901) 62 App. Div. 525, 71 N. Y. S. 282.

Validating consents.— This section formerly contained a provision confirming consents given from Jan. 1, 1890, to the enactment of the amendment of L. 1901, ch. 494, but this was held not to give life to a franchise

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theretofore forfeited for failure to construct under section 12. Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N. Y. S. 113.

Separate sale of extensions.— Where an application is made for a franchise to construct two or more extensions or branches of an existing road each must be offered for sale separately, and it is a fatal irregularity to group them as one franchise. This is true though the two extensions, with an intervening line of the applicant, would form one continuous line, and the applicant agrees that the successful bidder may use such intervening line, and this is not authorized by statute. Beekman v. Third Ave. R. Co., (1897) 153 N. Y. 144, 47 N. E. 277, affirming 13 App. Div. 279, 43 N. Y. S. 174.

Condition as to cash deposit.— A condition that the applicant shall deposit one million dollars subject to draft for construction which shall be expended within two years or be forfeited, the amount being about one-half the sum required for extension, is not unreasonable or invalid. Abraham v. Meyers, (1893) 29 Abb. N. Cas. 384, 23 N. Y. S. 225, 228.

Condition as to time of construction.— Under this section the local authorities may condition their consent on the completion of the road in a less time than that fixed by section 179, and provide for a forfeiture for failure to comply with the condition. It seems, however, that a provision in a franchise that failure to complete the road in a specified time shall forfeit the franchise and all rights under it shall cease without legal proceedings, will not authorize a forfeiture ipso facto as circumstances may excuse the delay. Dusenberry v. New York, etc., Traction Co., (1899) 46 App. Div. 267, 61 N. Y. S. 420.

Condition as to fare.—The requirement of a condition that but one fare shall be charged for passage over an extension and over the main line is sufficiently complied with by a condition that but one fare shall be exacted for passage from or to the extension, where the balance of the consent shows that a compliance with the statute was intended. Beekman v. Third Ave. R. Co., (1897) 153 N. Y. 144, 47 N. E. 277, affirming 13 App. Div. 279, 43 N. Y. S. 174.

Requiring lump sum payment.—The local authorities are not authorized to require payment of a lump sum in addition to a percentage of receipts on a sale under this section. Beekman v. Third Ave. R. Co., (1897) 153 N. Y. 144, 47 N. E. 277, affirming 13 App. Div. 279, 43 N. Y. S. 174.

Percentage of receipts.— It seems that the percentage of receipts bid under this section is in addition to the percentage to which the city is entitled under section 175. Southern Boulevard R. Co. v. People's Traction Co., (1896) 5 App. Div. 330, 39 N. Y. S. 266, affirming 16 Misc. 263, 39 N. Y. S. 266. It has been said that the utmost that can be bid under this section is one hundred per cent of the net profits. Southern Boulevard R. Co. v. North New York City Traction Co., (1896) 16 Misc. 263, 39 N. Y. S. 266, affirmed in 5 App. Div. 330, 39 N. Y. S. 266, wherein this statement was merely characterized as dictum.

Enjoining completion of sale.— It seems that a bidder at a sale cannot procure an injunction against further proceedings thereon where there has been a subsequent bona fide higher bid. Southern Boulevard R. Co. v. People's Traction Co., (1896) 5 App. Div. 330, 39 N. Y. S. 266, affirming 16 Misc. 263, 39 N. Y. S. 266.

Cited.— This section was cited in Brooklyn Heights R. Co. v. Steers, (1914) 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C 791 (see § 170); Phoenix v. Gannon, (1909) 195 N. Y. 471, 88 N. E. 1066, reversing 123 App. Div. 93, 108 N. Y. S. 255 (see § 170); Bahmer v. Haffen, (1900) 161 N. Y. 390, 55 N. E. 1047, affirming 35 App. Div. 381, 54 N. Y. S. 1030 (see § 171); Heerwagen v. Crosstown St. R. Co., (1904) 90 App. Div. 275, 86 N. Y. S. 218; Gaedeke v. Staten Island Midland R. Co., (1899) 43 App. Div. 514, 60 N. Y. S. 598 (see § 171); People v. North Tonawanda, (1910) 70 Misc. 91, 126 N. Y. S. 186 (see § 21); Adamson v. Nassau Electric R. Co., (1895) 89 Hun 261, 34 N. Y. S. 1073 (see § 171).

§ 174. Proceedings if property owners do not consent. If the consent of property owners required by any provision of this article can not be obtained, the corporation failing to obtain such

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consents may apply to the appellate division of the supreme court held in the department in which it is proposed to construct its road for the appointment of three commissioners to determine whether such railroad ought to be constructed and operated. Notice of such application must, at least ten days prior thereto, be served, personally, upon each nonconsenting property owner by delivering the same to the person to whom such property is assessed upon such assessment-roll or by duly mailing the same, properly folded and directed, to such property owner at his post-office address with the postage prepaid thereon. If the person upon whom service is to be made is unknown, or his residence and post-office address are unknown and can not by reasonable diligence be ascertained, service of such notice may be made by publishing the same in such newspaper of the county as the court may direct, at least once a week for two successive weeks. Upon due proof of service of such notice the court to which the application is made shall appoint three disinterested persons, who shall act as commissioners, and who shall, within ten days after their appointment, cause public notice to be given of their first meeting in the manner directed by the court, and may adjourn from time to time, until all their business is completed. Vacancies may be filled by the court after such notice to parties interested as it may deem proper to be given; and the evidence taken before as well as after the happening of the vacancy shall be deemed to be properly before such commissioners. After a public hearing of all parties interested, the commissioners shall determine whether such railroad ought to be constructed and operated, and shall make a report thereon, together with the evidence taken, to the appellate division, within sixty days after appointment, unless the court, or a judge thereof, for good cause shown, shall extend such time; and their determination that such road ought to be constructed and operated, confirmed by such court, shall be taken in lieu of the consent of the property owners hereinbefore required. The commissioners shall each receive ten dollars for each day spent in the performance of their duties and their necessary expenses and disbursements, which shall be paid by the corporation applying for their appointment.

This section was derived from the Railroad Law of 1890, § 94, as amended by L. 1892, ch. 676.

Constitutional provisions relating to consent of property owners: see CONSTITUTION, art. III, § 18.

Abutters owning fee.— This section applies to streets in which the abutting owners hold the fee. Schenectady R. Co. v. Peck, (1903) 88 App. Div. 201, 84 N. Y. S. 759.

Prerequisites to appointment of commissioners.—The only prerequisite to the appointment of commissioners is the fact that the consent of the required number of property owners cannot be obtained. Matter of Auburn City R. Co., (1895) 88 Hun 603, 34 N. Y. S. 992.

Inability to procure consents.— The reason why the requisite consents can not be obtained is immaterial provided a fair and reasonable effort has been made to procure the same. Matter of Broadway Surface R. Co., (1885) 34

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Hun 414. By reason of the provisions of section 180 requiring the consent of property owners to a change of motive power, where a railway has been authorized to use electricity as a motive power, refusal to sign a consent to the construction of a railway to be operated by electricity or any other power approved by the public service commission is not such a refusal to consent to construction as authorizes proceedings under this section. Matter of Kingsbridge R. Co., (1901) 66 App. Div. 497, 73 N. Y. S. 440.

Certificate of convenience.— Proceedings under this section may be taken before procuring a certificate of convenience under section 9. Matter of Buffalo Traction Co., (1898) 25 App. Div. 447, 49 N. Y. S. 1052, affirmed (1898) 155 N. Y. 700, 50 N. E. 1115.

Consent of local authorities.— It is not essential that the railway should procure the consent of the local authorities before proceeding under this section. Matter of Auburn City R. Co., (1895) 88 Hun 603, 34 N. Y. S. 992; Matter of Broadway Surface R. Co., (1885) 34 Hun 414; Matter of Buffalo Traction Co., (1898) 25 App. Div. 447, 49 N. Y. S. 1052, affirmed (1898) 155 N. Y. 700, 50 N. E. 1115.

Notice of application.— Notice of the application need not be given to tenants or occupants whose names do not appear on the assessment rolls. Matter of Broadway Surface R. Co., (1885) 34 Hun 414.

Proceedings on application.— The appellate division has no power to hear, try or determine the case in the first instance and where a proper case is presented it has no discretion but must appoint commissioners as prayed for. Matter of Thirty-fourth St. R. Co., (1886) 102 N. Y. 343, 7 N. E. 172, reversing 37 Hun 442.

Proceedings on favorable report.— The determination of the commissioners is without force or effect until confirmed by the court which may determine for itself whether the facts disclosed are sufficient to justify granting the petition. Matter of Port Chester St. R. Co., (1899) 43 App. Div. 536, 60 N. Y. S. 160.

Proceedings on adverse report.— While on its face this section does not provide for any action by the appellate division on an adverse report, yet that court has power to set aside such a report for fraud, mistake or gross irregularity. If through misconduct, palpable error or accident they fail to make such a report as the law contemplates new commissioners may be appointed or the matter remitted to the same commissioners with proper instructions. Matter of Nassau Electric R. Co., (1901) 167 N. Y. 37, 60 N. E. 279, reversing 6 App. Div. 141, 40 N. Y. S. 334.

Matters for consideration of commissioners.— The commissioners may take into consideration all the circumstances including the probable growth, the convenience of the public and the fact that there is a territory beyond the proposed extension which at an early date must be accommodated, which can only be done after the proposed extension is built. Matter of United Traction Co., (1907) 119 App. Div. 806, 104 N. Y. S. 377. On an application for permission to build a railway on a highway which has been improved at large expense by private persons the commissioners may properly consider whether there are other routes equally available and calculated to accommodate the public in an equal degree. Matter of Port Chester St. R. Co., (1899) 43 App. Div. 536, 60 N. Y. S. 160.

Commissioners were appointed under this section in Matter of Fonda, etc., R. Co., (1914) 164 App. Div. 919, 149 N. Y. S. 1081.

Cited.— This section was cited in Matter of Rochester, etc., R. Co., (1900) 51 App. Div. 65, 64 N. Y. S. 429 (see § 180); Hornell, etc., R. Co. v. Dansville, (1908) 127 App. Div. 867, 111 N. Y. S. 845 (see § 21); Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., (1912) 78 Misc. 220, 139 N. Y. S. 216 (see § 22).

§ 175. Percentage of gross receipts to be paid in cities or villages; report of officers. Every corporation building or operating a railroad or branch or extension thereof, under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, within any city of the state having a population of twelve hundred thousand or more, shall,

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for and during the first five years after the commencement of the operation of any portion of its railroad annually, on November first, pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per centum of its gross receipts for and during the year ending September thirtieth next preceding; and after the expiration of such five years, make a like annual payment into the treasury of the city to the credit of the same fund, of five per centum of its gross receipts. If a street surface railroad corporation existing and operating any such railroad in any such city on May sixth, eighteen hundred and eighty-four, shall have thereafter extended its tracks or constructed branches therefrom, and shall operate such branches or extensions under the provisions of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, or of this article, such corporation shall pay such percentages only upon such portions of its gross receipts as shall bear the same proportion to its whole gross receipts as the length of such extension or branches shall bear to the entire length of its line. In any other incorporated city or village the local authorities shall have the right to require, as a condition to their consent to the construction, operation or extension of a railroad under the provisions of this article, the payment annually of such percentage of gross receipts, not exceeding three per centum, into the treasury of the city or village as they may deem proper. In case of extension the amount to be paid shall be ascertained in the manner heretofore provided. The corporation failing to pay such percentage of its gross earnings shall, after November first, pay in addition thereto five per centum a month on such percentage until paid. The president and treasurer of any corporation required by the provisions of this article to make a payment annually upon its gross receipts shall, on or before November first in each year, make a verified report to the comptroller or chief fiscal officer of the city of the gross amount of its receipts for the year ending September thirtieth, next preceding, and the books of such corporation shall be open to inspection and examination by such comptroller or officer, or his duly appointed agent, for the purpose of ascertaining the correctness of its report as to its gross receipts. The corporate rights, privileges and franchises acquired under this article or such chapter by any corporation, which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the state, and upon judgment of forfeiture rendered in an action brought in the name of the people by the attorney-general, shall cease and determine.

This section was derived from the Railroad Law of 1890, § 95, as amended by L. 1892, ch. 676.

Legislative policy.— The legislative policy disclosed by this section is to levy a toll upon all the earnings of a railway without attempting to differentiate between the earnings of tangible and intangible property. **People v. State Board of Tax Com'rs, (1910) 69 Misc. 1, 125 N. Y. S. 895.**

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Use of tracks of another company.— The percentage referred to in this section is required to be paid by a corporation which has procured a franchise from the local authorities to operate its railway in a street regardless of the fact that it uses the tracks of an existing railway. New York v. Fulton St. R. Co., (1909) 130 App. Div. 791, 115 N. Y. S. 410, reversing 59 Misc. 630, 112 N. Y. S. 494.

Payments by lessor.— The "gross receipts" referred to in this section are those arising from the operation of the railway, i. e., from fares, so that a corporation which has leased its lines is not liable to pay the percentage, which should be paid by the operating company. New York v. Thirty-fourth St. Crosstown R. Co., (1910) 137 App. Div. 644, 122 N. Y. S. 344.

Percentages payable under section 173.— The percentage payable under this section is in addition to that bid under section 173. Southern Boulevard R. Co. v. People's Traction Co., (1896) 5 App. Div. 330, 39 N. Y. S. 266, affirming 16 Misc. 263, 39 N. Y. S. 266.

Change of territorial limits.— It has been held that a railway built within territory not falling within the mandatory provisions of this section is liable to pay the fixed percentage where the territory subsequently becomes part of a city within the section. New York v. Pelham Park R. Co., (1910) 68 Misc. 205, 124 N. Y. S. 958.

Cited.— This section was cited in New York Rys. Co. v. New York, (1916) 218 N. Y. 483, 113 N. E. 501; Bohmer v. Haffen, (1900) 161 N. Y. 390, 55 N. E. 1047, affirming 35 App. Div. 381, 54 N. Y. S. 1030 (see § 171); Heerwagen v. Crosstown St. R. Co., (1904) 90 App. Div. 275, 86 N. Y. S. 218; Adamson v. Nassau Electric R. Co., (1895) 89 Hun 261, 34 N. Y. S. 1073 (see § 171).

§ 176. Extension of route over rivers; terminus in other counties; when property owners withhold consent; supreme court may appoint commissioners. Any street railroad in operation in this state, which shall, by a two-thirds vote of its directors, decide to extend the route of its road, so as to cross a river over and by any bridge now or hereafter constructed under the provisions of any law of this state, may so extend its route over and across such bridge upon such terms as may be mutually agreed upon between it and such bridge company, and may locate the terminus of its road in the county adjoining the one in which its road is now located and in operation, upon first obtaining the consent of such bridge company or its lessees, and the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, or in case the consent of such property owners can not be obtained the appellate division of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine after a hearing of all parties interested, whether such railroad ought to be constructed, or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. Whenever a terminus of any public viaduct, bridge or bridges, or public viaduct connected with any bridge or bridges, heretofore or hereafter constructed in and owned and maintained by any city of the first class, or town adjoining the same, is or shall be located at or adjacent to or within one-half mile of the route of any existing street surface

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railroad, the corporation owning or operating such railroad may, irrespective of any provisions otherwise applicable thereto contained in any general or local act, upon obtaining the consent of the local authorities and property owners as above provided, and upon complying with the provisions of this chapter applicable thereto, extend its road or route and construct and operate its railroad, to, upon and across such viaduct, bridge or bridges and approaches thereto for the purpose of connecting with another railroad route not more than one-half mile distant from such bridge or viaduct so as to afford a continuous ride for one fare, subject to the provisions of this chapter, or for the purpose of reaching the depot, station or terminus of another railroad not more than one-half mile distant from such bridge or viaduct. This section shall not apply to any bridge over the Hudson or East rivers in the counties of New York and Kings, nor to any bridge or viaduct constructed under the provisions of any so-called grade crossing law.

This section was derived from the Railroad Law of 1890, § 96, as amended by L. 1901, ch. 419, § 1.

§ 177. Use of tracks of other roads. Any railroad corporation in this state, whose cars are run and operated by horses or other motive power, authorized by this article, upon the surface of the street, excepting in the county of New York, may, for the purpose of enabling it to connect with and run and operate its cars between its tracks, and a depot or car-house owned by it, run upon, intersect, and use, for not exceeding five hundred feet, the tracks of any other railroad corporation, the cars of which are run and operated in like manner with the necessary connections and switches for the proper working and accommodation of the cars upon such tracks, and in connection with such depot or car-house, upon paying therefor such compensation as it may agree upon with the corporation owning the tracks to be so run upon, intersected, and used; and in case such corporations can not agree upon the amount of such compensation, the same shall be ascertained and determined in the manner prescribed in the condemnation law.

This section was derived from the Railroad Law of 1890, § 97.
Construction of road in street where other road is built: see infra, § 183.

§ 178. Repair of streets; rate of speed; removal of ice and snow. Every street surface railroad corporation, so long as it shall continue to use [1]or maintain any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks, and two feet in

[1] Words "or maintain" new.

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width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of [2]twenty days' notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulations and ordinances as to the rate of speed, mode and use of tracks, and removal of ice and snow, as the interest or convenience of the public may require. A corporation whose agents or servants willfully or negligently violate such an ordinance or regulation shall be liable to such city or village for a penalty not exceeding five hundred dollars, to be specified in such ordinance or regulation.

This section was derived from the Railroad Law of 1890, § 98, as amended by L. 1892, ch. 676. It was amended by L. 1912, ch. 368. The amendments are shown in the footnotes.

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I. In General

Compelling removal of rails.—Where the rails of a street railway have become worn, uneven and irregular so as to prevent the laying of pavements the remedy afforded by this section is not exclusive and the municipality may maintain an action to have them declared a nuisance so as to justify their removal. New York v. Montague, (1911) 145 App. Div. 172, 129 N. Y. S. 1084.

Snow and ice.— In the absence of statute no duty rests upon a street railway to keep the portion of the street between its tracks free from ice and snow. Silberstein v. Honston, etc., R. Co., (1889) 117 N. Y. 293, 22 N. E. 951. When, however, a street railway removes the snow from its tracks it must exercise reasonable care to prevent its accumulation on the street in such a manner as to cause injury to a person lawfully thereon. Dixon v. Brooklyn, etc., R. Co., (1885) 100 N. Y. 170, 3 N. E. 65.

Cited.— This section was cited in Bohmer v. Haffen, (1900) 161 N. Y. 390, 55 N. E. 1047, affirming 35 App. Div. 381, 54 N. Y. S. 1030 (see § 171; Willcox v. Richmond Light, etc., Co., (1910) 142 App. Div. 44, 127 N. Y. S. 1150, affirmed (1911) 202 N. Y. 515, 148 App. Div. 893, 210 N. Y. 682; Mack Par. Co. v. New York, (1911) 142 App. Div. 702, 127 N. Y. S. 738; Op. Atty.-Gen. (1906) 184.

II. Municipal Regulation of Operation

Speed.— The power of a city to regulate the speed of cars cannot be contracted away and a franchise provision as to speed does not preclude regulation thereof under this section. Brooklyn v. Nassau Electric R. Co., (1887) 20 App. Div. 31, 46 N. Y. S. 651. A speed ordinance enacted under this section to be valid must be reasonable. "The interests of the public require

[2] Formerly "thirty."

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that cars in public streets shall be operated at a rate of speed that shall be low enough not to be dangerous to the safety of the person or the property of those using the streets and the convenience of the public requires them to be operated at as high a rate of speed as is commensurate with reasonable safety." An ordinance limiting speed to six miles per hour has been held invalid. United Traction Co. v. Watervliet, (1901) 35 Misc. 392, 71 N. Y. S. 977.

Vestibules on cars.— The authority given by this section to regulate the "mode and use of tracks" relates to the preservation of the interests and convenience of the public in the use of the streets and tracks as such, and the regulations to be lawful must be directed to matters connected with the construction and operation of the cars which in some manner involve and affect the streets and tracks and their use. A regulation requiring vestibules on cars for the protection of employees is not, therefore, authorized. Yonkers v. Yonkers R. Co., (1900) 51 App. Div. 271, 64 N. Y. S. 955.

III. Repair of Streets

1. *In General*

Legal meaning of "require" in statute relating to paving of streets by railway company: see Ann. Cas. 1912A 1237, note.

Contract by street railway to keep street in "repair" as imposing obligation to repave with different form of pavement: see Ann. Cas. 1914B 129 note.

Duty of street railway company to keep in repair portions of streets occupied by its right of way in absence of contract or statutory direction: see 7 Ann. Cas. 381, note.

Common law duty.— Even in the absence of statute it seems that it is the duty of a railroad legally occupying a public street to keep its structure in such a condition of repair that the street will be safe for travel, and that after a new pavement has been laid it is required to keep such portion thereof as is adjacent to or part of its structure in repair, but it is under no common law duty to construct new pavement. New York v. Bleecker St., etc., R. Co., (1909) 130 App. Div. 830, 115 N. Y. S. 592.

Exercise of taxing power.— This section is an exercise of the taxing power. People v. State Board of Tax Comr's, (1913) 209 N. Y. 496, 103 N. E. 776; Rochester v. Rochester R. Co., (1905) 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773, reversing 98 App. Div. 521, 91 N. Y. S. 87, affirmed 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784.

Repair of bridge.—This section refers to the surface of a street "but the statute was not intended to require a railroad company to construct a highway, or build its foundation, or build a bridge. It may construct its line over the bridge, and under this provision it is required to keep the floor of the bridge in a safe and proper condition for travel over it." Queensbury v. Hudson Val. R. Co., (1912) 75 Misc. 197, 135 N. Y. S. 200.

Power to relieve railway of burden.— The provisions of this section are mandatory and the municipal authorities have no discretion to relieve a railway from the burdens which it imposes. Conway v. Rochester, (1898) 157 N. Y. 33, 51 N. E. 395, reversing 24 App. Div. 489, 49 N. Y. S. 244, (distinguishing Gilmore v. Utica, (1890) 121 N. Y. 561, 24 N. E. 1009, which dealt with a statute differently worded which was held directory merely) followed in People v. Utica, (1899) 45 App. Div. 356, 61 N. Y. S. 31. It has been held that a county which is authorized to acquire a turnpike owned and occupied by a railway has no power to stipulate, as part of the transfer of title, that the railway shall be relieved from the burdens imposed by this section. New York v. Brooklyn, etc., R. Co., (1913) 156 App. Div. 856, 142 N. Y. S. 472, affirmed (1914) 213 N. Y. 634 mem. But cities of the third class, towns and villages may, by contract relieve a street railway from the burden of this section under section 173. Davidge v. Binghamton, (1901) 62 App. Div. 525, 71 N. Y. S. 282, affirming 26 Misc. 208, 56 N. Y. S. 105. And see Kent v. Binghamton, (1904) 94 App. Div. 522, 88 N. Y. S. 34.

Inspector of pavements.— A municipality has no power, under this section, to appoint an inspector of the pavement to be kept in repair by a railway

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and make his salary a charge on the railway. Bell v. Joline, (1910) 125 N. Y. S. 514.

Payment in installments.— The charter of a city providing for the payment of paving assessments in installments where bonds have been issued may preclude the recovery of the entire cost from a street railway immediately, it being entitled to pay in installments. Orange County Traction Co. v. Newburgh, (1914) 86 Misc. 512, 149 N. Y. S. 1.

Pavement as tangible property.— While the cost of pavements under this section is some evidence of the value of the intangible right to operate a railway in the street and may properly be considered in assessing a franchise tax in ascertaining the value of the franchise the pavement does not belong to the railroad and should not be treated as a part of its tangible property. People v. State Board of Tax Comr's, (1913) 209 N. Y. 496, 103 N. E. 776, overruling, People v. State Board of Tax Comr's, (1912) 145 N. Y. S. 226; People v. Tax Com'rs, N. Y. L. J., Nov. 27, 1912 (two cases); People v. State Board of Tax Com'rs, (1913) 157 App. Div. 165, 142 N. Y. S. 180; People v. State Board of Tax Com'rs, (1913) 159 App. Div. 136, 144 N. Y. S. 74, affirmed (1914) 212 N. Y. 607 mem.; People v. Willcox, (1903) 156 App. Div. 603, 141 N. Y. S. 677. To like effect see People v. State Board of Tax Com'rs, (1913) 156 App. Div. 466, 142 N. Y. S. 116, (1913) 209 N. Y. 502, reversing 77 Misc. 235, 136 N. Y. S. 474; Op. Atty.-Gen. (1915) 34; Op. Atty.-Gen. (1914) 33. But the cost of paving should be considered in valuing the franchise. Op. Atty.-Gen. (1914) 33; Op. Atty.-Gen. (1914) 382.

2. *Extent of duty*

Repavement.—The duty of repair imposed by this section includes the duty to repave when ordered by the local authorities. Conway v. Rochester, (1898) 157 N. Y. 33, 51 N. E. 395, reversing 24 App. Div. 489, 49 N. Y. S. 244, quoted and approved in New York v. Harlem Bridge, etc., R. Co., (1906) 186 N. Y. 304, 78 N. E. 1072. To like effect see People v. Fobes, (1912) 151 App. Div. 245, 135 N. Y. S. 747, affirmed (1914) 210 N. Y. 598 mem.; New York v. Broadway, etc., R. Co., (1909) 130 App. Div. 834, 115 N. Y. S. 872; New York v. Ninth Ave. R. Co., (1909) 130 App. Div. 839, 115 N. Y. S. 876; New York v. Metropolitan St. R. Co., (1909) 130 App. Div. 842, 115 N. Y. S. 878. A city may require a street to be repaved with any kind of material necessary to make the new paving conform to the paving in the remainder of the street. New York v. Linch, (1914) 161 App. Div. 292, 146 N. Y. S. 357. And under this section even where the pavement within the railroad area is in good repair, if the balance of the street is in poor repair and the local authorities determine to construct a new pavement of a different kind the street railway may be compelled to pay for new pavement within its area, and it has no constitutional right to be heard on the question whether the requirement is reasonable. New York v. New York City R. Co., (1909) 132 App. Div. 156, 116 N. Y. S. 939, affirming 60 Misc. 487, 113 N. Y. S. 869. The fact that a contract between a village and a street railway requires the latter to pave between its tracks with small stones does not preclude the village from requiring a different pavement under this section. Mechanicville v. Stillwater, etc., R. Co., (1901) 35 Misc. 513, 71 N. Y. S. 1102, affirmed (1901) 67 App. Div. 628 mem., 174 N. Y. 507 mem.

Space to be paved.— Under this section "the part of the street to be repaired by the company is two feet in width measured from the outside of each outside rail" and not "two strips one foot in width measured from each outside rail." Amsterdam v. Fonda, etc., R. Co., (1907) 119 App. Div. 680, 104 N. Y. S. 411, affirming 51 Misc. 438, 101 N Y. S. 694. While it would seem that where a franchise for a double track road requires a larger space between the two tracks than is usual the railway is under a duty merely to pave so much of the street as would ordinarily be occupied by a double track road, yet where a franchise requires a line of poles between the two tracks which necessitates a larger space than is usual and it is expressly required that the railway comply with this section the railway must pave the entire space between the exterior rails and for a distance of two feet outside thereof. Orange County Traction Co. v. Newburgh, (1914) 86 Misc. 512, 149 N. Y. S. 1. See also Op. Atty.-Gen. (1891) 265.

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3. *Persons and Corporations Liable*

Receiver.— An action at law by a municipality to recover the cost of repairs is properly maintainable against a receiver in possession when notice was given, without regard to the length of his prior possession, and it is not necssary to sue in equity for an apportion of the cost. But a receiver who has never assumed control over a particular line or received any rental therefor is not liable for repairs made to the street under this section, though the corporation of which he is receiver has asserted rights or ownership over the tracks. New York v. Linch, (1914) 161 App. Div. 292, 146 N. Y. S. 357, affirmed (1914) 213 N. Y. 638 mem.

Corporation acquiring exempt railway.—A corporation organized since this section was enacted is subject to its burdens even as to streets occupied by a lessee whose stock it has acquired under section 149 though the lessor enjoyed a special exemption from such burden, as the exemption is not a privilege which passes to the lessee. Rochester R. Co. v. Rochester, (1907) 205 U. S. 236, 27 S. Ct. 469, 51 U. S. (L. ed.) 784, affirming (1905) 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773.

Corporation organized before enactment.—This section has been applied to a corporation organized and in operation before its enactment on the ground that by continuing to use the streets an obligation to comply with the statute is imposed. New York v. Broadway, etc., R. Co., (1909) 130 App. Div. 834, 115 N. Y. S. 872; Doyle v. New York, (1901) 58 App. Div. 588, 69 N. Y. S. 120.

Equities between railways.— Liability to the municipality arises under this section "from the conjunction of use, disrepair and service of notice, and . . . the length of prior use is immaterial. The road or roads which are, in fact or as matter of law, found to be using the road when repairs become necessary and notice to repair is given, are liable without regard for any so-called equities between each other." New York v. Linch, (1914) 161 App. Div. 292, 146 N. Y. S. 357, affirmed (1914) 213 N. Y. 638 mem.

Lessee.—A lessee in possession of and using tracks must pave streets as required by this section. Pennsylvania Steel Co. v. New York City R. Co., (1911) 191 Fed. 216.

4. *Notice to Railway*

Necessity.—Where no notice was given a city is not entitled to reimbursement for the cost of paving, as the railway is entitled to an opportunity to do the work itself. New York v. Metropolitan St. R. Co., (1909) 130 App. Div. 842, 115 N. Y. S. 878.

Time.—Where a notice to repair was given before this section went into effect to which the railway replied that it would reimburse the city for whatever expense was imposed on it by law, any objection to the notice is waived. New York v. Broadway, etc., R. Co., (1909) 130 App. Div. 834, 115 N. Y. S. 872. The fact that a city let a contract for paving a whole street including the railroad area before the thirty days after notice to the railroad had expired, and that work was also begun under the contract within that period outside the railroad area, does not defeat the right to reimbursement where the railroad did nothing at any time indicating an intention to comply with the notice. New York v. New York City R. Co., (1909) 132 App. Div. 164, 116 N. Y. S. 765.

Sufficiency.—A notice to a railway which contains no distinct requirement to repair the pavement or lay a new pavement within thirty days, and which makes no statement as to what part of the pavement it is required to pay for is not a sufficient notice. New York v. Bleecker St. etc., R. Co., (1909) 130 App. Div. 830, 115 N. Y. S. 592.

Waiver.—Where on an insufficient notice all liability is denied notice is waived. New York v. Ninth Ave. R. Co., (1909) 130 App. Div. 839, 115 N. Y. S. 876.

5. *Liability for Injuries*

In general.—The duty "of municipalities of keeping their streets and highways in good and safe condition is, to the extent specified by the statute, also devolved upon the railroad corporations, whose duty with reference

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thereto becomes the same as that which rests upon the municipality" and governed by the same statutes of limitation. Hayes v. Brooklyn Heights R. Co., (1910) 200 N. Y. 183, 93 N. E. 469.

Necessity of notice to repair.—The duty of a railway to keep in permanent repair the portion of the streets between its tracks and for two feet outside thereof is an original duty and is not dependent on notice from the municipality, and it is liable for damages due to non-repair though no notice to repair has been given. Schuster v. Forty-second St., etc., R. Co., (1908) 192 N. Y. 403, 85 N. E. 670, affirming 118 App. Div. 197, 102 N. Y. S. 1054; Simon v. Metropolitan St. R. Co., (1899) 29 Misc. 126, 60 N. Y. S. 251; Doyle v. New York, (1901) 58 App. Div. 588, 69 N. Y. S. 120.

Slight depression.—With respect to the liability of a railway for injury caused by a slight depression in a street, as in case of a municipality, each case rests largely on its own circumstances. While not liable for slight depression as a general rule, liability exists if the depression is peculiar and especially calculated to cause injury. Kantrowitz v. Brooklyn, etc., R. Co., (1916) 173 App. Div. 192, 159 N. Y. S. 263.

Defect caused by city.—The duty to repair resting on a railway does not extend to replacing pavement taken up by the city to repair a water main, and the railroad is not liable for injuries caused thereby. Swift v. Brooklyn Heights R. Co., (1909) 134 App. Div. 134, 118 N. Y. S. 827. Where a city has in the course of construction created a defect in a street within the railroad area the railroad is not liable for injuries caused thereby, as it is under no duty to remedy such a defect. Snell v. Rochester R. Co., (1892) 64 Hun 476, 19 N. Y. S. 496.

Exemption by provision in paving contract.—Where, on failure of a railway to pave after notice, the city lets a contract for paving the entire street, a provision in the paving contract guaranteeing the entire pavement against defects for a specified time applies to defects in the pavement within the tracks of the railway. Urvalde Contracting Co. v. Matheson, (1916) 219 N. Y. 286, 114 N. E. 388, reversing 173 App. Div. 938, 158 N. Y. S. 1133. The railway company is relieved of its duty to repair for the term stated by a provision in the paving contract that the contractor shall keep the pavement in repair for a specified time. Binninger v. New York, (1904) 177 N. Y. 199, 69 N. E. 390, modifying 80 App. Div. 438, 81 N. Y. S. 226; Maloney v. New York, (1913) 154 App. Div. 608, 139 N. Y. S. 794; Welsh v. Syracuse Rapid Transit R. Co., (1902) 70 App. Div. 362, 75 N. Y. S. 173.

§ 179. Within what time road to be built. In case any street surface railroad corporation shall not commence the construction of its road, or of any extension or branch thereof, within one year after the consent of the local authorities and property owners or the determination of the appellate division of the supereme court as herein required, shall have been given or renewed, and shall not complete the same within three years after such consents or determination shall have been obtained, its rights, privileges and franchises in respect of such railroad or extension or branch, as the case may be, may be forfeited. If the performance of any act required by this chapter or any prior acts within the times therein prescribed, is hindered, delayed or prevented by legal proceedings in any court, such court may also extend such time for such period as the court shall deem proper or if the performance of any act required by said statutes within the times therein prescribed is hindered, delayed or prevented by works of public improvement, or from any other or different cause, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and

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shall be deemed to be extended for the period covered by such hindrance, delay or prevention. The time for compliance with any requirement in this or any former act, by a street surface railroad corporation incorporated for the purpose of constructing a street surface railroad and which has prior to March twenty-fifth, nineteen hundred and two, obtained or shall prior to June thirtieth, nineteen hundred and three, obtain such consents or determination is hereby extended until June thirtieth, nineteen hundred and four.

This section was derived from the Railroad Law of 1890, § 99, as amended by L. 1902, ch. 209, § 1.

When corporate powers to cease: see supra, § 12.

Duty in absence of time limit.— Even when there is no statutory time limit for the beginning of construction or operation, and no such condition is attached to the municipal franchise, it is the company's duty to exercise its franchises within a reasonable time. Op. Atty.-Gen. (1905) 207.

Franchise provision shortening time.—The time may be shortened by a condition in the franchise which may be imposed by local authorities under section 173. Dusenberry v. New York, etc., Traction Co., (1899) 46 App. Div. 267, 61 N. Y. S. 420.

Effect on section 12.—This section, while not self-executing, does not exclude the application of section 12, providing for a similar but self-executing forfeiture to street railways. Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N. Y. S. 113.

Forfeiture per se.— Failure to commence or complete the railway within the time fixed by this section does not ipso facto work a forfeiture, and a forfeiture can be adjudged only in a direct proceeding by the state. Coney Island, etc., R. Co. v. Kennedy, (1897) 15 App. Div. 588, 44 N. Y. S. 825.

Right of municipality to judicial determination of forfeiture.— Notwithstanding that a forfeiture provision may be self-executing, the municipality may invoke judicial proceedings to declare the forfeiture. Op. Atty.-Gen. (1905) 207.

Excuse for delay.—Where the delay is occasioned by the acts of city officials there is no ground for forfeiture. Coney Island, etc., R. Co. v. Kennedy, (1897) 15 App. Div. 588, 44 N. Y. S. 825.

Cited.—This section was cited in Op. Atty.-Gen. (1900) 327.

§ 180. Motive power. Any street surface railroad may operate any portion of its road by animal or horse power, or by cable, electricity, or any power *than locomotive steam power, which said locomotive steam power is primarily generated by the locomotive propelling the cars, and in the use of which either escaping steam or smoke is visible, which may be approved by the public service commission and consented to by the owners of one-half of the property bounded on that portion of the railroad, with respect to which a change of motive power is proposed; and if the consent of such property owners can not be obtained, the determination of three disinterested commissioners, appointed by the appellate division of the supreme court of the department in which such railroad is located, in favor of such motive power, confirmed by the court, shall be taken in lieu of the consent of the property owners. The consent of the property owners shall be obtained and the proceedings for the appointment and the determination

* So in original. Evidently should read "other than."

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of the commissioners and the confirmation of their report shall be conducted in the manner prescribed in sections one hundred and seventy-one and one hundred and seventy-four of this article, so far as the same can properly be made applicable thereto. Any railroad corporation making a change in its motive power under this section, may make any changes in the construction of its road or roadbed or other property rendered necessary by the change in its motive power. Where a street surface railroad in the counties of Herkimer and Hamilton is located wholly outside the limits of an incorporated city or village, such railroad may, with the approval of the public service commission, be operated by locomotive steam power, provided that such steam power is generated by oil from and including April fifteenth to and including November thirtieth, and by either oil or coal from and including December first to and including April fourteenth.

This section was derived from the Railroad Law of 1890, § 100, as amended by L. 1901, ch. 553, § 1.

Change of motive power authorized: see infra, § 209.

Approval of power on construction.—This section implies that before a road may be operated the motive power must be approved by the commission. Matter of Kingsbridge R. Co., (1901) 66 App. Div. 497, 73 N. Y. S. 440.

Application to company incorporated under special law.—In Op. Atty.-Gen. (1897) 159, it was ruled that the board of railroad commissioners were authorized to approve a change of motive power by a street surface railroad incorporated under a special law.

Number of consents required.—The consents which must be obtained are those of the owners abutting on that part of the street where a change of motive power is proposed. Destitute Blind Soc. v. Forty-second St., etc., R. Co., (1899) 26 Misc. 601, 57 N. Y. S. 881. In one case it has been held that a majority of the owners in lineal feet, and not in value, is what is meant by this section. Destitute Blind Soc. v. Forty-second St., R. Co., (1899) 26 Misc. 601, 57 N. Y. S. 881. A later case in a higher court, however, holds that the consent of "the owners of one-half of the property" which must be obtained for a change in motive power means the owners of one-half in value and not one-half in lineal feet. Matter of Rochester, etc., R. Co., (1900) 51 App. Div. 65, 64 N. Y. S. 429.

Power to give consent.—One holding a mere power of sale cannot grant a consent under this section. Destitute Blind Soc. v. Forty-second St., etc., R. Co., (1899) 26 Misc. 601, 57 N. Y. S. 881.

Reconsideration of approval by commission.—Where a railroad has obtained the approval of the public service commission and the consent of the necessary property owners to a change of motive power it acquires a privilege in the nature of a franchise and the commission cannot reconsider its approval. People v. Board of R. Com'rs, (1898) 30 App. Div. 69, 51 N. Y. S. 781, affirmed on opinion below (1898) 156 N. Y. 693, 51 N. E. 1093.

Permit to open street.—Where a railroad has procured the consents of property owners and the approval of the public service commission to a change of motive power it is entitled to a permit to open the street to make the necessary changes and mandamus will lie to compel the issuance of a permit. Potter v. Callis, (1897) 19 App. Div. 392, 46 N. Y. S. 471, affirmed (1898) 156 N. Y. 16, 50 N. E. 413.

Kinetic stored steam power.—This section does not prohibit the use of kinetic stored steam power, whereby steam is stored in a reservoir kept hot by a slow hard coal fire, there being no escaping smoke or steam and no noise incident thereto. People v. Board of R. Com'rs, (1898) 32 App. Div. 179, 52 N. Y. S. 908, affirmed on opinion below (1899) 158 N. Y. 711, 53 N. E. 1129.

Cited.—This section was cited in Bloss v. Oneida R. Co., (1914) 162 App. Div. 200, 147 N. Y. S. 728 (see § 171); Matter of Kingsbridge R. Co., (1901) 66 App. Div. 497, 73 N. Y. S. 440. See supra, § 180.

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§ 181. Rate of fare. No corporation constructing and operating a railroad under the provisions of this article, or of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is carried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a half miles. This section shall not apply to any part of any road constructed prior to May sixth, eighteen hundred and eighty-four, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law.

This section was derived from the Railroad Law of 1890, § 101, as amended by L. 1897, ch. 688, § 1.

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I. In General

Extension of city boundaries.— In the case of an extension of the boundaries of a city by annexing a village through the medium of two narrow connecting links of territory several miles long there is a question whether the extension is not so extraordinary as to preclude the operation of this section. Willis v. Rochester, (1916) 93 Misc. 239, 157 N. Y. S. 815, affirmed (1916) 173 App. Div. 957 mem. But see Willis v. Rochester, (1916) 95 Misc. 686, 159 N. Y. S. 882, affirmed (1916) 175 App. Div. 909 mem., 219 N. Y. 427 mem., sustaining the regulation there passed upon.

Application to city of Buffalo.—The provisions of this section, so far as the rate of fare is concerned, are superseded by the Milburn agreement applicable to the city of Buffalo. Bingemann v. International R. Co., (1911) 73 Misc. 458, 131 N. Y. S. 4.

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Requirement as to transfers.—This section does not require the giving of transfers but leaves it to the railway to make any suitable arrangement to carry its passengers for the required distance at the price fixed, and the adoption of the transfer system is merely the adoption of a suitable device. Bingemann v. International R. Co., (1911) 73 Misc. 458, 131 N. Y. S. 4.

Rules as to transfers.—A railway company may make reasonable rules as to transfers and a rule that the time when a transfer is given shall be indicated on its face and that it shall be good for passage only for fifteen minutes thereafter, and that no transfer will be accepted for passage on which the time is not indicated, is reasonable. Weber v. Rochester, etc., R. Co., (1911) 145 App. Div. 84, 129 N. Y. S. 304; Muckle v. Rochester R. Co., (1894) 79 Hun 32, 29 N. Y. S. 732. While a company may place a time limit within which transfers may be used it can do so only where it exercises due efforts to have a car pass within the time limited on which the transfer can be used. Daniels v. Brooklyn Heights R. Co., (1910) 67 Misc. 78, 121 N. Y. S. 577.

Necessity of making trip on one car.—The right to ride for a single fare is not dependent on whether the passenger did or did not attempt to make his trip in a single car. Bull v. New York City R. Co., (1908) 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. (N. S.) 778, affirming 121 App. Div. 582, 106 N. Y. S. 378, and disapproving O'Connor v. Brooklyn Heights R. Co., (1907) 123 App. Div. 784, 108 N. Y. S. 471, followed in King v. Nassau El. R. Co., (1908) 128 App. Div. 130, 112 N. Y. S. 589. To like effect is Oatman v. International R. Co., (1917) 163 N. Y. S. 495.

Transfer from local to through car.— This section does not require a street railway to transfer a passenger to another car to continue on the same line to his destination where he could have taken a through car to his destination and the destination of the car which he boarded was indicated on the car. Roach v. Brooklyn Heights R. Co., (1907) 119 App. Div. 520, 104 N. Y. S. 219. But where the destination was not so indicated as to call the passenger's attention thereto a different rule applies. Goodman v. New York R. Co., (1913) 81 Misc. 207, 142 N. Y. S. 520, 88 Misc. 95, 150 N. Y. S. 702.

Collecting bridge toll.—It seems that a railway which crosses a toll bridge is bound under this section to charge but five cents for a passage on its line over the bridge and that it cannot collect an additional amount as toll which it is compelled to pay the bridge company, as such toll is a part of its operating expenses. People v. Public Service Commission, (1911) 143 App. Div. 769, 128 N. Y. S. 384, affirmed (1911) 202 N. Y. 547.

Penalty for violation.—Where a passenger is refused a transfer to which he is entitled under this section but does not board another car and so is not compelled to pay an additional fare he cannot recover the penalty provided for by section 59. Baron v. New York City R. Co., (1907) 120 App. Div. 134, 105 N. Y. S. 258. But where this section is violated and an extra fare exacted the person aggrieved may recover the penalty prescribed in section 59. Bingeman v. International R. Co., (1911) 73 Misc. 458, 131 N. Y. S. 4.

Inference as to carriage of freight.—The use of the word "fare" in this section does not indicate that street railways are not authorized to carry freight. De Grauw v. Long Island Electric R. Co., (1899) 43 App. Div. 502, 60 N. Y. S. 163, affirmed (1900) 163 N. Y. 597 mem.

II. Corporations Within Section

Elevated or steam railroad.—This section applies only to street surface railways and has no application to an elevated or steam surface railway on which electricity has been substituted as a motive power, though such railways are operated by a street surface railway company. People v. Brooklyn Heights R. Co., (1907) 187 N. Y. 48, 79 N. E. 838.

Street railway operated on tracks of steam railroad.—This section does not prohibit the charging of more than five cents for a trip over a street surface railway and the line of a steam railroad which has been leased by the corporation operating the street railway and converted into an electric line, especially where the steam railroad was constructed prior to 1884. Barnett v. Brooklyn

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Heights R. Co., (1900) 53 App. Div. 432, 65 N. Y. S. 1068, followed, but criticized, in McNulty v. Brooklyn Heights R. Co., (1901) 36 Misc. 402, 73 N. Y. S. 698. And see Brooklyn Electric R. Co. v. Brooklyn, etc., R. Co., (1897) 23 App. Div. 29, 48 N. Y. S. 665. And the same rule applies to a street railway using the tracks of a steam railroad under an oral agreement or license. Enton v. Nassau Electric R. Co., (1910) 68 Misc. 385, 124 N. Y. S. 555.

Corporation operating under traffic agreement.— By virtue of section 148 the obligations imposed by this section apply where one company operates its cars over the tracks of another company pursuant to a traffic arrangement. Weber v. Rochester, etc., R. Co., (1911) 145 App. Div. 84, 129 N. Y. S. 304.

New roads operated by old company.—This section has been held to apply to connecting roads built by different corporations but controlled and operated by a corporation organized under the Street Railroad Act of 1884. McNulty v. Brooklyn Heights R. Co., (1901) 36 Misc. 402, 73 N. Y. S. 698. This is because the exception of railroads constructed prior to 1884 is confined to railroads so constructed and operated by their owners and does not apply in favor of a corporation since organized and operating the road as lessee. McNulty v. Brooklyn Heights R. Co., (1900) 31 Misc. 674, 66 N. Y. S. 57.

Old roads operated by new company.—This section does not apply to a corporation organized under this chapter, which operates lines constructed and in operation prior to 1884, and which has never acquired the right to extend road or construct branches. Braffett v. Brooklyn, etc., R. Co., (1912) 204 N. Y. 440, 97 N. E. 888.

Stock control of intersecting roads.—The operation or control of a road here mentioned means "the control of the operation of the road, and not merely a control of the corporation or individuals who operate it" so that a corporation operating a railroad intersected by another road operated by another corporation, a majority of whose stock it owns, is not bound to give transfers to such other road and carry its passengers over the same for a single fare. Senior v. New York City R. Co., (1906) 111 App. Div. 39, 97 N. Y. S. 645, affirmed (1907) 187 N. Y. 559, 80 N. E. 1120.

Burden of proof.—This section is applicable only to the corporations specified in the first sentence and a party who relies on its provisions must show that the corporation is one of those specified. Mendoza v. Metropolitan St. R. Co., (1900) 51 App. Div. 430, 64 N. Y. S. 745.

III. Branches Within Section

In general.— Mere proof that two lines of a street railway intersect each other, without proof that one is an extension or branch of the other, is not sufficient to show that a passenger was entitled to a transfer from one to the other. Oatman v. International R. Co., (1917) 163 N. Y. S. 495.

Connection of parallel lines.—Where two parallel lines are connected by a line originally owned by a different company and all are subsequently combined in one system the two parallel lines are not connections or branches of each other so that the owner thereof is not bound to give a transfer which will carry a passenger on one line, across to and on the other parallel line. Bull v. New York City R. Co., (1908) 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. (N. S.) 778, affirming 121 App. Div. 582, 106 N. Y. S. 378.

Connecting line also parallel.—A passenger on one line is entitled to a transfer on an intersecting line though the latter line after running at right angles for a short distance turns and runs parallel to the first line, so that the passenger may ride back in the general direction from which he came on the transfer. The objection that such a rule gives the passenger a round trip for one fare is untenable as he is entitled to a "continuous" trip, with no stop over, so that no object would be gained by the round trip. People v. Public Service Commission, (1915) 167 App. Div. 279, 153 N. Y. S. 18, affirmed (1916) 219 N. Y. 565, 114 N. E. 1078, distinguishing Kelly v. New York City R. Co., (1908) 192 N. Y. 97, 84 N. E. 569, which construed former section 104 and limited the right to transfers to travel in the same general direction, on the ground that that case related to New York city, which was sui generis.

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IV. Legislative Regulation of Fares

Power of municipality apart from contract to regulate rates of street railway company: see 33 L. R. A. (N. S.) 761 note; 43 L. R. A. (N. S.) 994 note.

Free transportation to policemen and firemen: see General Municipal Law, § 206.

Constitutionality.—The restrictions on the power of the legislature contained in Const., art. III, § 18, do not preclude legislative regulation of fares as contained in this section. Willis v. Rochester, (1916) 95 Misc. 686, 159 N. Y. S. 882, affirmed (1916) 175 App. Div. 909 mem., 219 N. Y. 427 mem.

Reduction of franchise fare.— By reason of the reservation of the right to regulate and reduce fares made in this section, the public service commission may order a reduction of fare on a railway which has a contract with a municipality, made since the enactment of the section, fixing the fare to be charged between two points. People v. Public Service Commission, (1912) 153 App. Div. 129, 138 N. Y. S. 434.

Increase of franchise fare.— Notwithstanding franchise provisions as to the rate of fare the legislature has power, under the constitution, to regulate the rate of fare charged by public service corporations, and may, as it has done, give the public service commission power to increase the rate of fare. People v. Public Service Commission, (1916) 175 App. Div. 869, 162 N. Y. S. 405.

§ 182. Collection of fare. It shall be unlawful for any corporation, or an employee thereof, operating a street surface railroad, or a branch thereof, on which the motive power is electricity, which road or branch is operated wholly or in part in a city having at least one million inhabitants and which crosses the boundaries of a city of the first class, to collect fare of a passenger more than once for and during one continuous ride on a single car or train; excepting that fare may be once collected separately outside the city limits for passenger service to or from such limits, and once separately within the city for the service therein. A person or corporation violating the provisions of this section shall be liable to a penalty of twenty-five dollars for each violation, recoverable by the passenger aggrieved thereby.

This section was derived from the Railroad Law of 1890, § 101a, as added by L. 1907, ch. 229, § 1.

Street railroad transfer tickets not to be given away or sold: see Penal Law, § 1566.

Requiring passenger to put coin in box or automatic registering device: see 32 L. R. A. (N. S.) 695 note.

Right of street car company to require passenger to pay a second fare where he passes from one car to another on the same line: see 13 L. R. A. (N. S.) 445 note.

§ 183. Construction of road in street where other road is built. No street surface railroad corporation shall construct, extend or operate its road or tracks in that portion of any street, avenue, road or highway, in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings, or, in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants over any bridges, without first obtaining the consent of the corporation owning and maintaining

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the same, except that any street surface railroad company may use the tracks of another street surface railroad company for a distance not exceeding one thousand feet, and if in a city having a population of less than thirty-five thousand inhabitants, for a distance not exceeding fifteen hundred feet, and in cities, villages and towns of less than one million two hundred and fifty thousand inhabitants, shall have the right to lay its tracks upon, and run over and use any bridges used wholly or in part as a footbridge, whenever the court upon an application for commissioners shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed or operated as an independent railroad, or to connect said railroad with a ferry, or with another existing railroad, and that the public convenience requires the same, in which event the right to use shall only be given for a compensation to an extent and in a manner to be ascertained and determined by commissioners to be appointed by the courts as is provided in the condemnation law, or by the public service commission in cases where the corporations interested shall unite in a request for such commission to act. Such commissioners in determining the compensation to be paid for the use by one corporation of the tracks of another shall consider and allow for the use of the tracks for all injury and damage to the corporation whose tracks may be so used. Any street surface railroad corporation may, in pursuance of a unanimous vote of the stockholders voting at a special meeting called for that purpose by notice in writing, signed by a majority of the directors of such corporation, stating the time, place and object of the meeting, and served upon each stockholder appearing as such upon the books of the corporation, personally or by mail, at his last known post-office address, at least sixty days prior to such meeting, guarantee the bonds of any other street surface railroad corporation whose road is fully or partly in the same city or town or adjacent cities or towns.

This section was derived from the Railroad Law of 1890, § 102, as amended by L. 1894, ch. 693, § 1.

Use of tracks of other roads: see supra, § 177.

Franchise provision requiring consent.—A street railway may consent to the use of its tracks by another company before as well as after they are constructed, so that a provision in the franchise granted it by a municipality that it shall permit such use, accepted by the railway, is valid and binding. Staten Island Midland R. Co. v. Staten Island Electric R. Co., (1898) 34 App. Div. 181, 54 N. Y. S. 598.

Consent as condition of franchise.—A street railway may, however, procure a franchise from local authorities for the operation of a road over a street occupied by an existing railway without first obtaining the consent of the existing railway, that being but one step in the proceeding. Electric City R. Co. v. Niagara Falls, (1905) 48 Misc. 91, 95 N. Y. S. 73. So also, it may proceed to acquire the consent of adjacent owners before it has obtained the consent of the existing company. Matter of Thirty-fourth St. R. Co., (1886) 102 N. Y. 343, 7 N. E. 172.

Necessary consents to condemnation.—Where a street railway seeks to

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acquire the right to use the tracks of another company by compulsory proceedings under this section it must first procure the consents of the local authorities and abutting owners under section 171. Colonial City Traction Co. v. Kingston City R. Co., (1897) 154 N. Y. 493, 48 N. E. 900, affirming on rehearing (1897) 153 N. Y. 540, 47 N. E. 810, which affirmed 15 App. Div. 195, 44 N. Y. S. 732.

Consent of railroad as franchise.— It seems that the consent of one railroad to the use of its tracks by another, under this section, does not create a franchise. New York v. Fulton St. R. Co., (1909) 130 App. Div. 791, 115 N. Y. S. 410, reversing 59 Misc. 630, 112 N. Y. S. 494.

Restraining construction of road.— Under this section a non-consenting street railway having tracks in a street has a sufficient interest to entitle it to sue to restrain the construction of another railway in the street without its consent. Central Crosstown R. Co. v. Metropolitan St. R. Co., (1897) 16 App. Div. 229, 44 N. Y. S. 752.

Presumption as to ownership of cars.— By reason of this section there is a presumption that cars run over tracks owned by a particular railway belong to it. Jennings v. Brooklyn Heights R. Co., (1907) 121 App. Div. 587, 106 N. Y. S. 279.

§ 184. Abandonment of part of route. Any street surface railroad corporation may declare any portion of its route which it may deem no longer necessary for the successful operation of its road and convenience of the public to be relinquished or abandoned. Such declaration of abandonment must be adopted by the board of directors of the corporation under its seal, which shall be submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by law for meetings of stockholders for the approval of leases by railroad corporations for the use of their respective roads. If the stockholders shall, at such meeting, ratify and adopt such declaration of abandonment, the secretary of the company shall so certify under the seal of the corporation, upon such declaration. Such declaration shall then be submitted to the public service commission for its approval, and if approved by such commission, such approval shall be indorsed thereon or annexed thereto and the declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the time of such filing, such portion of the route designated in the declaration shall be deemed to be abandoned.

This section was derived from the Railroad Law of 1890, § 103, as amended by L. 1900, ch. 478, § 1.

Right to abandon route.—As to when a part of a street railroad route may be abandoned and when not, see an opinion of the public service commission reported in 6 St. Dept. Rep. 21.

Review of action of commission.—Where there is disputed question of fact the action of the commission in refusing to approve a proposed abandonment should not be reversed, on certiorari, unless the evidence preponderates greatly against the conclusion of the commission. People v. Public Service Commission, (1916) 173 App. Div. 826, 160 N. Y. S. 91.

Abandonment by receiver.—A receiver of a street railway appointed in a mortgage foreclosure action has no authority, with the consent of the local authorities and adjacent owners, to abandon a franchise without the consent of the state, the stockholders, or authority from the court appointing him. Paige v. Schenectady R. Co., (1904) 178 N. Y. 102, 70 N. E. 213, affirming 84 App. Div. 91, 82 N. Y. S. 192, and reversing 84 App. Div. 91, 82 N. Y. S. 192.

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§ 185. Effect of dissolution of charter as to consents. Whenever any street surface railroad corporation shall have been dissolved or annulled, or its charter repealed by an act of the legislature, the consent of owners of property bounded on, and the consent of the local authorities having the control of that portion of a street or highway upon which the railroad of such corporation shall have been theretofore constructed and operated, and the order of the appellate division confirming the report of any commissioner that such railroad ought to be constructed or operated, shall not, nor shall either thereof, be deemed to be in any way impaired, revoked, terminated or otherwise affected by such act of dissolution, annulment or repeal, but the same and each thereof shall continue in full force, efficacy and being. The right to the further enjoyment and to the use thereof, subsequent to such act of dissolution, annulment or repeal, and of all the powers, privileges and benefits therein or thereby created, shall be sold at public auction by the local authorities within whose jurisdiction such railroad shall be, in the same manner as is provided in section one hundred and seventy-three of this article. When such sale shall have been so made, the purchaser thereat shall have the right to the further enjoyment and use of such consents and orders, and of each thereof, and of all the powers, privileges and benefits therein or thereby created, in like manner as if such purchaser had been originally named in such consents, reports and orders; if such purchaser shall be otherwise authorized by law to construct, maintain and operate a street surface railroad within the municipality within which such railroad shall be.

This section was derived from the Railroad Law of 1890, § 105, as amended by L. 1892, ch. 676.

§ 186. Corporate rights saved in case of failure to complete road; right to operate branches; conditions; former consents ratified; limitations. The corporate existence and powers of every street surface railroad corporation, which has completed a railroad upon [1]a substantial portion of the route designated in its certificate of incorporation, [2]or of extension, within ten years from the date of filing such certificate in the office of the secretary of state, and which was operating such completed portion of its railroad on the twenty-third day of March, [3]nineteen hundred twelve, and had operated [4]a portion of the same continuously for a period of five years immediately preceding said date, shall continue [5]as to the completed portion of said road only with like force and effect, as though it had in all respects complied with

[1] Words "a substantial" in place of "the greater".
[2] Words "or of extension" new.
[3] Formerly "nineteen hundred".
[4] Words "a portion of" new.
[5] Words "as to the completed portion of said road only" new.

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the provisions of law with reference to the time when it should have fully completed its road, [6]or such extension. Every such corporation shall have the right to operate any extensions and branches of its railroad, now constructed and operated by it, which had been so constructed and operated by it, for a period of ten years immediately preceding said twenty-third day of March, [7]nineteen hundred and twelve, with like force and effect, as though the route of such exetensions and branchtes were designated in its certificate of incorporation.

But every such street railroad corporation is authorized to operate such railroad and any extensions or branches thereof, upon condition that it has heretofore obtained, or shall hereafter obtain, the consent of the local authorities having the control of that portion of the streets, avenues or highways included in such railroad, or any extension or branch thereof, to the construction and operation of the same, and also upon the condition that it has heretofore obtained or shall hereafter first obtain the consent of the owners of one-half in value of the property bounded on the portion of the streets, avenues or highways included in the route of such railroad, or any extensions or branches thereof, to the construction and operation of the same, or in case the consent of such property owners can not be obtained, the appellate division of the supreme court of the department in which such railroad or any extension or branch thereof is located, may, upon application, appoint three commissioners who shall determine, after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners. If any street surface railroad corporation shall have made and filed a statement or statements of proposed extensions or branches embracing a line from the boundary of a city or village to the boundary of another city or village generally parallel with the route specified in its certificate of incorporation and generally distant not more than one-half mile therefrom, and shall have made and filed an agreement of consolidation with some other street surface railroad corporation formed to build a street railroad upon a route continuous or connecting with one or more of the routes described in such statement or statements of proposed extensions or branches, and thereafter there shall have been constructed and operated for a period of four years a street surface railroad from such city or village to such other city or village upon a line embraced in any such proposed extensions or branches, such consolidated corporation may relinquish and abandon any unconstructed route or unconstructed portions of route specified in the certificate of incorporation or in any statements or proposed extensions or branches of such first-mentioned corporation by filing

[6] Words "or such extension" new.
[7] Formerly "nineteen hundred".

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in the office of the secretary of state a copy of a resolution of the board of directors of such consolidated corporation certified by its president and secretary, declaring such unconstructed route or unconstructed portions of route relinquished and abandoned, and thereupon the corporate rights, powers and franchises of such consolidated corporation shall be and continue the same as though the certificate of incorporation of such constituent corporation had specified the constructed and not the unconstructed portions of such route and proposed extensions and branches. All consents given, or grants made by local authorities having the control of the portion of any street, avenue, or highway included in the route of such railroad, or any extensions or branches thereof, to any such street surface railroad corporation, prior to March twenty-third, [8]nineteen hundred and twelve, are hereby ratified and confined and declared valid. [9]This section shall not apply to or affect any railroad corporation in the city of New York; nor any special grant made to or authority conferred upon any street surface railroad corporation by any law of this state; nor any litigation pending on March twenty-third, [8]nineteen hundred and twelve; nor shall it impair rights, privileges, or franchises existing on said date of any street surface railroad corporation.

This section was derived from the Railroad Law of 1890, § 106, as amended by L. 1900, ch. 198, § 1. It was amended by L. 1914, ch. 489. The amendments are shown in the footnotes.

Cited.—This section was cited in Matter of Brooklyn, etc., R. Co., (1906) 185 N. Y. 171, 77 N. E. 994, affirming 106 App. Div. 240, 94 N Y. S. 113 (see § 179).

§ 187. Extensions and franchises confirmed. Any street surface railroad corporation which had prior to the tenth day of May, eighteen hundred and ninety-three, constructed and was on that date operating any extension or branch of its railroad along any streets or highways or portion thereof in a city having less than fifty thousand inhabitants, or in any town adjoining such city, and which had prior to said date obtained consent of the owners of one-half in value of the property bounded on, and the consents also of the local authorities having control of that portion of the streets, roads or highways upon which such extension or branch was constructed and being operated to the construction and operation of the same, is hereby authorized to operate and maintain any such branch or extension, upon filing in the office of the secretary of state a certificate, signed by its board of directors, which certificate shall contain a statement of the names of the cities, towns, villages and counties, and the names or description of the streets, avenues and highways in which such

[8] Formerly "nineteen hundred".

[9] Sentence omitted which read: "This section shall be applicable to any corporations whose lines are wholly within any towns, cities or villages having less than twenty thousand inhabitants."

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extensions or branches have been constructed, the places from and to which the same have been constructed, and are to be maintained and operated and the length thereof, as near as may be; thereupon said extensions and branches shall be deemed and considered a part of the lines of said railroad from the date of the filing thereof, and all corporate action relating to the construction, maintenance and operation of such extensions or branches, or creating liens upon the same by said corporation, are hereby validated and confirmed. Nothing in this section contained shall affect or impair any vested right or any litigation pending on said tenth day of May, eighteen hundred and ninety-three, nor shall any corporation which shall avail itself of the provisions of this section be deemed thereby to have waived any rights which it *therefore had to maintain and operate any branches or extension named in any certificate filed by it hereunder.

This section was derived from L. 1893, ch. 679, §§ 1, 2.

§ 188. Certain consents of local authorities confirmed. All consents given since December first, eighteen hundred and ninety-five, and prior to February first, eighteen hundred and ninety-six, by the local authorities of any city of the first or second class, to the construction, operation and maintenance of a street surface railroad in any such city by a railroad corporation which has not complied with the provisions of section nine of this chapter, or has failed to obtain the certificate therein provided for, are hereby validated and confirmed, and any such corporation may construct, operate and maintain a street surface railroad over, along and upon the streets, avenues, highways and public places described in such consent, upon obtaining the consent of the owners of property bounded on such streets, avenues, highways or public places as provided by law.

This section was derived from L. 1896, ch. 649, § 1.

§ 189. Time extended for payment of percentage based on gross receipts. Every corporation building or operating a street surface railroad, or a branch or extension thereof, under the provisions of this article, or chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, which, at any time during the period of six years prior to January first, nineteen hundred and one, became liable to pay any percentage based upon the gross receipts of said corporation, under the provisions of section one hundred and seventy-five of this article, and which heretofore has paid or hereafter shall pay, separately or together, the amount of such percentage and, in addition thereto, interest thereon at the rate of seven per centum per annum, computed

* So in original.

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from the time such percentage became due by said section one hundred and seventy-five up to the time such percentage was or shall be paid, by virtue of such payment or payments, shall be discharged of liability with the same force and effect as if the amount of such percentage had been paid upon the date when it first became due under the provisions of the said section of this article.

This section was derived from L. 1901, ch. 637, § 1.

§ 190. When sand and salt may be used on tracks. The owner or operator of any street surface railroad in cities of this state, may place upon the space between the rails, and upon the rails of such road sand in sufficient quantities to prevent the horses traveling thereon from slipping, and to enable cars operated by mechanical or electrical appliances to be safely and properly operated. The owner or operator of any street surface railroad in cities of this state may use salt in necessary quantities, upon the rails of all the switches, curves, turnouts and crossovers, between the first day of November of each year and the first day of May following, for the removal of snow and ice therefrom and to prevent the same from freezing. The quantity of salt to be used and the manner of applying salt to the rails shall be under the direction of the city officials having charge of the streets of said cities.

This section was derived from the Railroad Law of 1890, § 107, as amended by L. 1899, ch. 491, § 1.

§ 191. Road not to be constructed upon ground occupied by public buildings or in public parks. No street surface railroad shall be constructed or extended upon ground occupied by buildings belonging to any town, city, county or to the state, or to the United States, or in public parks, except in tunnels to be approved by the local authorities having control of such parks. Provided, however, that the commissioners of the state reservation at Niagara, by and with the consent of the commissioners of the land office, may construct, without expense to the state, street railroad tracks upon and along that part of the riverway, so called, between Falls and Niagara streets, in the city of Niagara Falls, and in their discretion may grant revocable licenses to street surface railroad companies to use such tracks upon such terms as said commissioners may prescribe. [1]And provided, further, that a street railroad may be constructed or extended upon a route or routes with a right of way not exceeding fifty feet in width in the Pelham Bay park in the city of New York, said route or routes to be designated and fixed by the board of estimate and apportionment of said city, with the approval of the park board of said city, and shall constitute the most direct, appropriate route or

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routes in the opinion of said board of estimate and apportionment and said park board, but no such street surface railroad shall be constructed or extended until a franchise or right therefor shall have been granted by said board of estimate and apportionment, pursuant to the statutes relating to the granting of such franchises or rights, and requiring adequate compensation therefor, and no company or corporation shall be given the exclusive right to operate a street surface railroad upon such route or routes, and no such street surface railroad shall be constructed at grade upon, along or across any of the existing or proposed streets, highways, driveways, parkways or park walks within the limits of said park.

This section was derived from the Railroad Law of 1890, § 108, as amended by L. 1899, ch. 710, § 1. It was amended by L. 1912, ch. 482. The amendment is shown in the footnote.

What constitutes park.—The prohibition as to parks applies to a village common or park though there exists a roadway through the same as a part thereof. Buffalo, etc., R. Co. v. Hoyer, (1915) 214 N. Y. 236, 108 N. E. 455, reversing 147 App. Div. 205, 132 N. Y. S. 31.

Parks created after franchise.—This section is limited to parks laid out or existing as such at the time a franchise is procured, and where a franchise has been procured before a park is laid out the laying out of the park does not preclude the construction of the railway. Coney Island, etc., R. Co. v. Kennedy, (1897) 15 App. Div. 588, 44 N. Y. S. 825.

§ 192. Center-bearing rails prohibited. No street surface railroad corporation shall hereafter lay down in the streets of any incorporated city or village of this state what are known as "center-bearing" rails; but in all cases, whether in laying new track or in replacing old rails, shall lay down "grooved" or some other kind of rail not "center-bearing" approved by the local authorities. Such grooved or other rail shall be of such shape and so laid as to permit the paving-stones to come in close contact with the projection which serves to guide the flange to the car wheel. Where in any city, the duty of repairing and repaving streets, as distinguished from the authorization of such paving, repairing and repaving, is by law vested in any local authority other than the common council of such city, such other local authority shall be the local authority referred to in this section.

This section was derived from the Railroad Law of 1890, § 109, as added by L. 1892, ch. 676.

Right of city to regulate kind of rails used by street railway: see Ann. Cas. 1912D 699 note.

What constitutes center bearing rail.— It seems that there is a difference of opinion among experts as to whether a T rail is a center bearing rail within the prohibition of this section, and such being the case in a negligence action the question should be submitted to the jury. Stebbins v. Hudson Val. R. Co., (1915) 170 App. Div. 1, 155 N. Y. S. 649. That a T rail was not a center bearing rail was held in Village of Lyons v. Rochester, etc., R. Co., (unreported; decided by Mr. Justice Foote on Oct. 28, 1905) approved in Op. Atty.-Gen. (1906) 184.

[1] Remainder of section new.

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§ 193. Right to cross bridge substituted for a bridge crossed for five years. Should any street surface railroad company have crossed any bridge as a part of its route for a period of more than five years and should any other bridge be substituted therefor at any time, such company shall have the right to cross such substituted bridge and to lay and use tracks thereon for the transit of its cars and to make all changes and extensions of its route subject to all the provisions of this chapter, as the convenient operation of its cars and public convenience may require.

This section was derived from the Railroad Law of 1890, § 110, as added by L. 1892, ch. 676.

§ 194. Protection of employees. Every corporation operating a street surface railroad in this state, except such as operate a railroad or railroads either in the borough of Manhattan or Brooklyn, in the city of New York, shall cause the front and rear platforms of every passenger car propelled by electricity, cable or compressed air, operated on any division of such railroad which extends in or between towns or outside of city limits, during the months of December, January, February and March, except cars attached to the rear of other cars, to be inclosed from the fronts of the platforms to the fronts of the hoods, so as to afford protection to any person stationed by such corporation on such platforms to perform duties in connection with the operation of such cars. Every corporation or person using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car so used and operated, to be collected in an action brought by the public service commission and to be paid to the treasurer of the state of New York, or in a suit by the attorney of the municipality in which the violation of the provisions of this section occurs, to be paid into the treasury of such municipality.

This section was derived from the Railroad Law of 1890, § 111, as added by L. 1903, ch. 325, § 1.

Is street or interurban railway affected by abrogation of fellow-servant rule as to "railroads": see 17 L. R. A. (N. S.) 117 note.

§ 195. Platforms on new cars, how constructed. All street surface railroad passenger cars purchased, built or rebuilt after the first day of December, nineteen hundred and four, and operated in the state of New York on and after said date, except those owned by any company operating either in the borough of Manhattan or Brooklyn, in the city of New York, shall be constructed in accordance with the provisions of the preceding section.

This section was derived from L. 1903, ch. 325, § 2.

§ 196. Protection to employees in the counties of Albany and Rensselaer. Every corporation operating a street surface railroad in the counties of Albany and Rensselaer shall cause

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the front and rear platforms of every car propelled by electricity, cable or compressed air, during the months of December, January, February and March, except cars attached to the rear of other cars, to be inclosed from the front and at least one side of the platform to the hood, so as to afford protection to any person stationed by such corporation on such platforms to perform duties in connection with the operation of such cars. Platforms on cars on such street surface railroads used more than one mile outside the limits of a city shall be completely inclosed from platform to hood. Every corporation using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car so used and operated, to be collected by the people to the use of the poor of the county in which such corporation has its principal office, in an action brought by the public service commission or the district attorney of such county. The supreme court may, on the application of a citizen, direct the district attorney to bring such action.

This section was derived from the Railroad Law of 1890, § 111-a, as added by L. 1903, ch. 426, § 1.

§ 197. Protection of employees in the counties of Kings and Queens. Every corporation operating a street surface railroad in the counties of Kings or Queens, shall cause the front and rear platforms of every passenger car propelled by electricity, cable or compressed air, operated on any division of such railroad during the months of December, January, February and March, except cars attached to the rear of other cars, to be inclosed from the fronts of the platforms to the fronts of the hoods so as to afford protection to any person stationed by such corporation on such platforms to perform duties connected with the operation of such cars. Every corporation or person using and operating a car in violation of this section shall be liable to a penalty of twenty-five dollars per day for each car used and operated, to be collected in an action brought by the public service commission and to be paid to the treasurer of the city of New York, or in a suit by the district attorney of the counties of Kings or Queens to be paid into the treasury of the city of New York.

This section was derived from the Railroad Law of 1890, ch. 565, § 112, as added by L. 1905, ch. 453, § 1. Another section 112 was added to the Railroad Law of 1890 by L. 1905, ch. 651.

§ 198. Contracts for the adjustment of payments due cities of the first class. The board of estimate and apportionment, or if such board do not exist, the local authorities which have power to make appropriation of moneys to be raised by taxation, in any city of the first class, shall have the power in their discretion, to enter into a contract or contracts on behalf of the city with any railroad corporation or corporations owning or operating street surface railroads or other railroads in such city, for the

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purpose of adjusting any or all differences now existing between such corporation or corporations and such city with respect to car license fees, percentages upon gross earnings, rentals and any other payments, other than taxes upon real and personal property, and capital stock, payable or claimed to be payable to the city under existing acts of the legislature, municipal ordinances, grants by, or contracts with, the municipal authorities or otherwise; and any such contract may provide for the payment of an annual amount to be ascertained as in such contract provided in lieu of any or all payments of any of the classes hereinbefore mentioned, other than taxes. Any such contract which shall be with a corporation operating lines of railroad by lease may provide for an annual payment, to be ascertained as in such contract provided, which shall be in lieu of any or all of the payments of any or all of said classes, other than taxes upon real and personal property and capital stock, which would otherwise be payable in respect of the leased lines so long as the lease or leases thereof shall continue. The annual payments provided for in any contract made under the authority of this section shall, so long as such contract is in force, supersede the payments which would otherwise be payable by the corporation or corporations making such contract and in lieu of which the annual payments provided for in such contract are substituted. Any contract made hereunder may, with the approval of the municipal authorities by whom the contract was made or their successors in office, be modified from time to time by the parties thereto for the purpose of meeting changed conditions. No contract shall be made or modified hereunder without the written consent and approval of the mayor and of the comptroller or other chief financial officer of the city.

This section was derived from the Railroad Law of 1890, § 112, as added by L. 1905, ch. 651, § 1. Another section 112 was added to the Railroad Law of 1890 by L. 1905, ch. 453.

§ 199. Sale of unclaimed property. It shall be the duty of every street surface railroad corporation doing business in this state, and of every corporation engaged in this state in the business of carrying passengers for hire in cabs, coaches, or other similar vehicles or of letting such vehicles for hire, or in the business of operating a line of stages or omnibuses, which shall have unclaimed property left in its cars, cabs, coaches, stages or other similar vehicles, to ascertain if possible, the owner or owners of such property, and to notify such owner or owners of the fact by mail as soon as possible, after such property comes into its possession. Every such corporation which shall have such property not perishable, in its possession for the period of three months, may sell the same at public auction, after giving notice to that effect, by one publication, at least ten days prior to the sale, in a daily newspaper published in the city or village in

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which such sale is to take place, of the time and place at which such sale will be held, and such sale may be adjourned from time to time until all the articles offered for sale are sold. All perishable property so left, may be sold by any such corporation without notice, as soon as it can be, upon the best terms that can be obtained.

This section was derived from L. 1899, ch. 488, § 1, as amended by L. 1907, ch. 463, § 1.

§ 200. **Disposition of proceeds.** All moneys arising from the sale of any such unclaimed property, after deducting charges for storage and expenses of sale, shall be paid by any such corporation to the treasurer of any association, composed of the employees of such corporation, having for its object the pecuniary assistance of its members in case of disability caused by sickness or accident, for the use and benefit of such association and its members; and where no such association of the employees of any such corporation is in existence at the time of any such sale, such moneys shall be paid over to the county treasurer of the county or if in a city, to the chief fiscal officer thereof, in which such sale took place for the benefit of such city or county.

This section was derived from L. 1899, ch. 488, § 2, as amended by L. 1907, ch. 463, § 2.

§ 201. **Construction of park railroads in cities having a population of one million five hundred thousand or upwards.** For the purpose of providing for the more speedy transportation of persons across public parks in the cities within the state of New York having a population of one million five hundred thousand or upwards it shall be lawful for the municipal authorities, officers, departments, or boards having control of such parks to construct railroads in and upon tunnels or roads or ways depressed below the surface of said parks in such cities in this state, and to extend the same east or west to connect with any surface railroads in such cities, now in existence, and with railroads which hereafter may be built by companies now chartered and existing, and to * conduct in the name of such cities, with any person or corporations for the construction thereof, and for the equipment and running of the same either with or without public advertisement upon such terms and conditions, including the rates of fare to be charged to persons using such railroads, for such compensation to be paid to such cities, and subject to such rules, regulations and requirements as may be determined upon in said contract, and as the department or board, or officer having charge of said parks may, from time to time, thereafter establish or impose.

This section was derived from L. 1892, ch. 532, § 1.

* So in original. Evidently should read "contract."

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§ 202. Consents of property owners. No railroads shall be constructed, equipped or operated by virtue of the preceding section except upon the condition that the consent of the owners of one-half in value of the property outside of said public parks bounded on and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct, operate or extend the said railroads to connect with any surface railroads in such cities be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after hearing of all parties interested, whether the portion of such railroad outside of said public parks ought to be constructed or operated, and their determination confirmed by the court may be taken in lieu of the consent of the property owners.

This section was derived from L. 1892, ch. 532, § 2.

Constitutional provisions regarding consents of property owners: see CONSTITUTION, Art. III, § 18.

§ 203. Expense of construction and operation. Whenever any railroad shall be constructed, equipped or operated under section two hundred and one, the expense of such construction, and in case said railroad shall be equipped and operated by such city, the expense of such equipment and operation shall be paid by the municipal corporation within which such railroad is situate, in the same manner as the other expenses of such municipal corporation are paid and provided for.

This section was derived from L. 1892, ch. 532, § 3.

§ 204. Agreements for payment of cost of construction by instalments. The department, board or officer having control of such public parks may agree with the person or corporation with whom any contract may be made for the construction, equipment and operation of said railroad that the cost of such construction shall be paid by such cities in instalments out of the compensation which such person or corporation shall agree to pay to such cities under any such contract from time to time as such compensation shall be received.

This section was derived from L. 1892, ch. 532, § 4.

§ 205. Disposition of income. The compensation or income which shall be received by such cities from such railroad, except as the same may be otherwise applied pursuant to the provisions of the preceding section, shall be paid into the treasury thereof.

This section was derived from L. 1892, ch. 532, § 5.

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§ 206. Motive power. Any portion of any railroad constructed, equipped and operated under section two hundred and one may be operated by animal or horse power, or by cable.

This section was derived from L. 1892, ch. 532, § 6.

§ 207. Railroads in parks in New York city, by whom constructed. Whenever any railroads shall be constructed in the city of New York, under the provisions of the preceding six sections, such railroads shall be constructed by the department of public parks of said city with the concurrence of the sinking fund commissioners of said city.

This section was derived from L. 1892, ch. 532, § 7.

§ 208. Issue of bonds by comptroller. Whenever any such railroad shall be constructed, equipped and operated under the provisions of the preceding seven sections in the city of New York, should no such agreement be made as is provided in section two hundred and four of this chapter, it shall be the duty of the comptroller of said city from time to time upon the request of the sinking fund commissioners to issue bonds or stock of the city in the aggregate sufficient to pay the expense of such construction, equipment or operation, which said bonds shall be paid out of taxation in not more than ten years from the date of their issue and shall bear interest not exceeding four per centum per annum and shall be sold at not less than par, and the cost of constructing, and in case the said railroad is equipped and operated by said city, the cost of equipping and operating said railroad shall be paid out of the proceeds of such bonds or stocks.

This section was derived from L. 1892, ch. 532, § 8.

§ 209. Change of motive power authorized. Any railroad company having the right to use any railroad now constructed in any public tunnel, road or way depressed below the surface of and wholly within any public park in any city within the state of New York having a population of one million five hundred thousand or upwards, may change the motive power and operate any such railroad by cable power, underground current of electricity, compressed air, or any other motive power other than locomotive steam power *than may be consented to by the authorities having control of such park or parks, and by the public service commission, and may make changes in the construction of the road or roadbed or other property made necessary by the change of motive power. Such reconstruction shall be at the sole cost and expense of the railroad company making such change, and when completed such improved railroad shall be the property

* So in original.

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of the municipal corporation having control of such public tunnel, road or depressed way.

This section was derived from L. 1898, ch. 597, § 1.

Joint cost of highway bridges occupied by the tracks of a street railroad company.—The following sections numbered 113–119a were added to the Railroad Law of 1893, ch. 565, by L. 1910, ch. 477. They were not included in the Consolidated Railroad Law of 1910 (ch. 481). The approval by the governor of the last cited law was accompanied by a memorandum, in part as follows: "These amendments are not repealed by this consolidated law, but are saved by the operation of section 100 of the General Construction Law which provides that a chapter of the consolidated law shall not be deemed to repeal an amendatory law passed at the same session of the legislature unless it is specifically designated in the repealing schedule."

§ 113. Street railroad company to share cost of highway bridge occupied by its tracks. Whenever any bridge upon a public street or highway shall be required to be built or rebuilt or replaced with a new bridge, which bridge is occupied or to be occupied by the tracks of a street railroad and it becomes necessary to build such bridge of greater width or of greater strength, or both, in order to properly accommodate the tracks of such street railroad and the traffic carried over them, than would be required to accommodate the other traffic and travel over such bridge, the street railroad company whose tracks are to or shall so occupy said bridge shall pay toward the construction thereof whatever sum or sums shall be required to pay for such additional construction, the amount to be determined as herein provided.

Railroad Law of 1890, ch. 565, § 113, as added by L. 1910, ch. 477.

§ 114. Commission to determine proportion after hearing. In case the municipality constructing such new bridge shall be unable to agree with the railroad company as to the additional width of the bridge, or the increased strength thereof, or the proportion of cost which should be borne and paid by the railroad company, either the municipality or the railroad company may apply to the public service commission of the district in which such bridge is situated for a determination of all the matters in controversy. Such application shall be made by verified petition. A hearing shall be had by the commission upon notice to the other party, and the proceeding shall be conducted according to the rules of practice established by the commission.

Railroad Law of 1890, ch. 565, § 114, as added by L. 1910, ch. 477.

§ 115. Order. The commission shall make an order, after such hearing, determining all the matters in controversy and fixing the proportion of the cost of the bridge which shall be paid by the railroad company.

Railroad Law of 1890, ch. 565, § 115, as added by L. 1910, ch. 477.

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§ 116. Railroad company not liable in certain cases. If any new bridge shall be built or contract let for the construction thereof before such final order shall be made, the railroad company shall not be liable for any part of the cost thereof.

Railroad Law of 1890, ch. 565, § 116, as added by L. 1910, ch. 477.

§ 117. Commission to fix amount. Upon the completion of the bridge, an account of the expenses incurred shall be presented by the municipality to the railroad company with a statement of the amount claimed to be due from the company. In case of any disagreement as to the amount due from the company the account shall be audited by the public service commission, which shall by order fix and determine the amount to be paid by the railroad company, which amount shall bear interest from the date of such order.

Railroad Law of 1890, ch. 565, § 117, as added by L. 1910, ch. 477.

§ 118. Amount to be assessed and levied if not paid. If such amount shall not be paid by the railroad company the municipality shall assess and levy the same upon the taxable property of the railroad company situate within its tax district, in the next tax levy, and the same shall be collected as are other taxes upon said property.

Railroad Law of 1890, ch. 565, § 118, as added by L. 1910, ch. 477.

§ 119. May be paid in installments in certain cases. In case the amount to be paid by the railroad company exceeds the sum of five thousand dollars, the company may elect to pay the same in equal annual installments, not exceeding ten in number, with interest. Such election shall be evidenced by a resolution of its board of directors, a certified copy of which shall be filed with the municipality. The amount due from the railroad company shall thereupon become a lien upon the property of the company to the same extent as a tax actually levied and assessed, and the installments, together with interest upon the whole amount, shall be inserted in the tax-roll each year for collection.

Railroad Law of 1890, ch. 565, § 119, as added by L. 1910, ch. 477.

§ 119a. Application of preceding sections. Sections one hundred and thirteen to one hundred and nineteen, both inclusive, of this article shall not apply to the construction of bridges over steam railroads.

Railroad Law of 1890, ch. 565, § 119a, as added by L. 1910, ch. 477.

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ARTICLE 6

*Rapid Transit Act of 1875

Section 220. Application for railroad; commissioners.
221. Oath and bond of commissioners.
222. First meeting of commissioners.
223. Determination of necessity of railroad and route.
224. Adoption of plans, and terms upon which road shall be built.
225. Appraisal of damages and deposit of money as security.
226. Shall prepare certificate of incorporation; proviso as to forfeiture.
227. Organization.
228. Commissioners to deliver certificate; affidavit of directors.
229. Powers.
230. Crossing of horse railroad track.
231. Where route coincides with another route.
232. Commissioners to transfer plans.
233. Commissioners to file report; confirmation thereof.
234. Pay of commissioners.
235. Quorum; term of office; removal; vacancies in board of commissioners.
236. Abandonment or change of route; new commissioners; their powers and proceedings.
237. Abandonment of portion of route by elevated railroad.
238. Increased deposit, when and how required.
239. Trains to come to full stop.
240. Gates or vestibule doors.
241. Penalty for violation of two preceding sections.
242. Sections to be printed and posted.
243. Extension of time.
244. Lighting cars on elevated railroads in cities of over twelve hundred thousand inhabitants.

§ 220. Application for railroad; commissioners. Upon the application of at least fifty reputable householders and taxpayers of any county or city, verified upon oath before a justice of the supreme court, that there is need in said county or city of a steam railroad in the streets, avenues and public places thereof for the transportation of passengers, mails or freight, the board of

* Laws 1875, ch. 606. This statute, together with the amendments thereto, was incorporated in the Railroad Law of 1890, ch. 565, article 6, "Other railroads in cities and counties."

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supervisors of such county may, within thirty days thereafter by resolution, approve of the application, and authorize its presentation to the supreme court, and if the railroad is to be built wholly within the limits of a city, upon the application of a like number of householders and taxpayers of the city to the mayor thereof, such mayor may, within thirty days thereafter, indorse upon the application his approval and direction that it may be presented to the supreme court, and if the railroad is to be built partly within the limits of a city and partly without, such application shall be approved, both by the mayor of the city and the board of supervisors of the county, and its presentation to the supreme court authorized by them, and upon presentation of such application so approved and authorized to a special term of the supreme court, held in the district where such railroad is to be built, or some part thereof, the court may appoint five commissioners, residents of the city if the railroad is to be built wholly within the city, and of the county, if it is to be built wholly or partly outside of the limits of a city, to determine the necessity of such railroad, the route thereof, the time within which and the conditions upon which it shall be constructed, the damages to the property owners along the line thereof and all the matters lawfully submitted to them, and discharge the duties imposed upon them by law.

This section was derived from the Railroad Law of 1890, § 120.

Constitutionality.—The Rapid Transit Act has been held not unconstitutional as delegating legislative power to the commissioners appointed under it, or because it is a special law. Matter of New York El. R. Co., (1877) 70 N. Y. 327. The statute contains sufficient provisions for compensation to owners whose lands were taken to render the statute unobjectionable. Matter of Rapid Tranit R. Com'rs, (1892) 65 Hun 63, 19 N. Y. S. 561. And see Gilbert El. R. Co. v. Anderson, (1877) 3 Abb. N. Cas. 434.

Lease of street railway.—The original act was held not to affect the General Railroad Act of 1850, so that a railroad could acquire the right to operate a street railway by a lease or traffic arrangement under the General Railroad Act. People v. Brooklyn, etc., R. Co., (1882) 89 N. Y. 75.

Construction of street railway.—The original act, which was somewhat different in its terms, was held to authorize the construction of a street surface railway, and not to be confined to underground or elevated railways. L. 1884, ch. 252, § 16, prohibited the construction of any street railway under the Rapid Transit Act, but section 18 had a saving clause which was held to preserve the rights of a railway theretofore fully organized under the Rapid Transit Act, though it had not completed the steps necessary to enable it to construct its road. New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332.

Nature of elevated railroad corporation.— In Op. Atty.-Gen. (1899) 183, the Manhattan Elevated Railway Company incorporated under L. 1875, ch. 606, the Rapid Transit Act, was held to be a railroad company, as distinguished from a street railroad company.

Necessity of substantial compliance.—A substantial compliance with the material requirements of this article is essential to a corporation de jure. Lamming v. Galusha, (1894) 81 Hun 247, 30 N. Y. S. 767, affirmed on opinion below (1896) 151 N. Y. 648, 45 N. E. 1132; New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332; Matter of Kings County El. R. Co., (1889) 112 N. Y. 47, 19 N. E. 654.

Verification of application.—The verification of the application need not be by all the signers but may be made by one who knew the parties and saw them

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sign. Matter of Kings County El. R. Co., (1887) 105 N. Y. 97, 13 N. E. 18.

Construction where another franchise exists.—There is nothing in this article prohibiting the construction of a railway in a street where another railway has a franchise under which nothing has been done, section 183 being the only provision on the subject. New York Cable R. Co. v. Chambers St., etc., R. Co., (1886) 40 Hun 29.

Defects in organization.—The legality of the corporation may be contested in a proceeding in the Appellate Division under section 223 to procure a report in substitution for the consent of property owners, and hence where there has been an order in such a proceeding this is res judicata and the question cannot subsequently be raised by property owners. Matter of Union El. R. Co., (1889) 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359. Where there has been a fatal defect in the organization of a corporation under this article, the defect cannot subsequently be cured by amendment, a general statute as to supplying defects in incorporation not applying to such corporation. Matter of New York Cable R. Co., (1888) 109 N. Y. 32, 15 N. E. 882, affirming 45 Hun 153, 9 N. Y. St. Rep. 836. Where there has been a colorable compliance with the statute in organizing a corporation, and a road has been built and operated, the corporation is one de facto so that for the acts purporting to be those of the corporation its directors are not liable on the theory that there was no valid incorporation. Lamming v. Galusha, (1894) 81 Hun 247, 30 N. Y. S. 767, affirmed on opinion below (1896) 151 N. Y. 648, 45 N. E. 1132.

§ 221. Oath and bond of commissioners. Within ten days after his appointment, and before entering upon the discharge of any of the duties of his office, each commissioner shall take and subscribe the constitutional oath of office, which shall be filed in the office of the clerk of the county and shall execute a bond to the people of the state in the penal sum of twenty-five thousand dollars, with two or more sureties, to be approved by a justice of the supreme court of the department in which the railroad is to be built and conditioned for the faithful performance of the duties of the office, which bond shall be filed in the office of the clerk of the county.

This section was derived from the Railroad Law of 1890, § 121.
Official oaths generally: see PUBLIC OFFICERS LAW, § 10.
Form of constitutional oath: see CONSTITUTION, art. XIII, § 1.
Official undertakings: see PUBLIC OFFICERS LAW, §§ 11, 12, 13, 15.

§ 222. First meeting of commissioners. Within fifteen days after their appointment, the commissioners shall meet in some convenient place in the county or city and organize themselves as a board with appropriate officers.

This section was derived from the Railroad Law of 1890, § 122.

§ 223. Determination of necessity of railroad and route. The commissioners shall, within thirty days after such organization, determine upon the necessity of such steam railroad, and if they find it to be necessary, they shall, within sixty days after such organization, fix and determine the route therefor, and shall have the exclusive power to locate such route, over, under, through or across the streets, avenues, places or lands in such county or city, and to provide for the connection or junction with any other railroad or bridge, if the consent of the owners of one-half in

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value of the property bounded on and the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad have been first obtained. If the consent of such property owners cannot be obtained, the determination of three commissioners appointed by the appellate division of the supreme court of the department where the railroad is to be constructed, made after due hearing of all parties interested, and confirmed by the court, that such railroad ought to be constructed and operated, may be taken in lieu of the consent of such property owners. No such railroad shall be located in or upon such portion of any street, avenue, place or lands in such county as are now occupied by an elevated or underground railroad or in which such a railroad has already been authorized by law to be so located and constructed, or which are contained in public parks, or occupied by buildings belonging to the county or the state or the United States, or in or upon the following streets, avenues and public places, viz.: Broadway, Fifth avenue, Fourth avenue above Forty-second street, in the borough of Manhattan, city of New York; Debevoice place, Irving place, Lefferts place, those portions of Grand, Classon and Franklin avenues and Downing street lying between the southerly line of Lexington avenue and the northerly line of Atlantic avenue, that portion of Classon avenue lying between the northerly line of Lexington avenue and the southerly line of Park avenue, and that portion of Washington avenue lying between Park and Atlantic avenues in the borough of Brooklyn; and that portion of the city of Buffalo lying between Michigan and Main streets; but such railroad may be located and constructed across such excepted streets, avenues and places only at their intersection with other streets, avenues and places.

This section was derived from the Railroad Law of 1890, § 123, as amended by L. 1892, ch. 676.

Conditions of consent of municipality.—The local authorities, in giving their consent, cannot impose conditions relating to matters over which the commissioners are given authority. Accordingly they cannot require a submission of the question of damages to abutters to city assessors, at the election of the abutters, or fix a different time for completion than that fixed by the commissioners. Matter of Kings County El. R. Co., (1887) 105 N. Y. 97, 13 N. E. 18.

Refusal of owners to consent.—Where the organization of the applicant and the plans of construction were defective when property owners were requested to consent, their refusal to consent cannot lay the basis for an application to the Appellate Division. Matter of New York Cable R. Co., (1888) 109 N. Y. 32, 15 N. E. 882, affirming 45 Hun 153, 9 N. Y. St. Rep. 836.

Change in details after consent.—The fact that after the general route and plan of construction has been determined an owner may be applied to for his consent and that thereafter a change in the details of the plans may be made, does not render the statute objectionable. Matter of Rapid Transit R. Com'rs, (1892) 65 Hun 63, 19 N. Y. S. 561.

Violation of conditions of consent.—A consent to a road on condition that it shall be erected in the center of the street becomes void when it is otherwise constructed. Farmers, etc., Co. v. New York El. R. Co., (1912) 150 App. Div. 565, 135 N. Y. S. 464.

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Time of application.—The application for the appointment of commissioners by the Appellate Division need not be made within sixty days from the organization of the mayor's commissioners, but may be made at any time before construction has been commenced. Matter of New York El. R. Co., (1877) 70 N. Y. 327.

Notice of application.—No notice of the application for the appointment of commissioners need be given to the property owners. Matter of New York El. R. Co., (1877) 70 N. Y. 327.

Notice of hearings.—The notice to be given by the commissioners of their hearings is not prescribed by this section, but notice must be given. An order that notice be given by publication in six leading daily newspapers seven times consecutively and by posting in fifty places along the route, provides for sufficient notice. Matter of New York El. R. Co., (1877) 70 N. Y. 327.

Affidavits as evidence.—The commissioners are not bound by legal rules of evidence and may receive affidavits as proof. Matter of New York El. R. Co., (1877) 70 N. Y. 327.

View by commissioners.—The commissioners are not restricted to acting upon the evidence submitted but may independently examine the question for themselves and be guided by their own judgment as well as by the evidence. Matter of Rapid Transit R. Com'rs, (1892) 65 Hun 63, 19 N. Y. S. 561.

Rejection of part of routes.—The commissioners may find in favor of the construction of some routes, and against others, and it is not necessary that they find that the routes selected are the best routes, which is a matter for the mayor's commissioners to determine. Matter of New York El. R. Co., (1877) 70 N. Y. 327, followed in Matter of Rapid Transit R. Com'rs, (1892) 65 Hun 63, 19 N. Y. S. 561.

Review of determination of Appellate Division.—The act of the Appellate Division in refusing to confirm the report of commissioners favorable to the construction of a road, not based solely on a question of law, is not reviewable in the Court of Appeals. Matter of Kings County El. R. Co., (1880) 82 N. Y. 95.

Order as determining legality of organization.—In a proceeding in the Appellate Division under this section the legality of the corporation may be put in issue and the order therein is conclusive on property owners who cannot thereafter raise the question. Matter of Union El. R. Co., (1889) 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359.

Prohibition as to named streets.—The prohibition against the construction of railroads on the streets named is limited to railroads organized under the Rapid Transit Act. Beekman v. Brooklyn, etc., R. Co., (1895) 89 Hun 14, 35 N. Y. S. 84.

§ 224. Adoption of plans, and terms upon which road shall be built. The commissioners by such public notice, and under such conditions, and with such inducements as they may prescribe, shall invite a submission of plans for the construction and operation of such railroad, and shall meet at a time and place in such notice named, not more than ninety days after their organization, and decide upon the plans for the construction thereof, with the necessary supports, turnouts, switches, sidings, connections, landing-places, stations, buildings, platforms, stairways, elevators, telegraph and signal devices, or other requisite appliances, upon the route or location determined upon by them. They shall, upon notice to the local authorities, and after hearing all parties interested, fix and determine what compensation, if any, in a gross sum, or in a certain percentage of receipts, shall annually be paid to the local authorities by the corporation formed for the purpose of constructing, maintaining and operating such railroad for public use in the conveyance of persons and property, for the use and

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occupation by the corporation of the streets, avenues and highways in and upon which its railroad is to be constructed, and the time when such railroad, or a portion thereof, shall be constructed and ready for operation, and the maximum rates to be paid for transportation and conveyance thereon, and the hours during which special cars or trains shall be run at reduced rates of fare; and the amount of the capital stock of such corporation, and the number of shares into which it shall be divided, and the percentage thereof to be paid in cash on subscribing for such shares.

The commisisoners may select two or more routes, upon one of which such railroad may be constructed and operated; and the local authorities may consent to the construction and operation of such railroad upon one or more of such routes, or parts thereof; and the commissioners shall have power to change and re-adopt routes and plans for the construction and operation of such railroad after they have been submitted to the local authorities, in cases where such authorities may recommend such changes, or may not be willing to consent to the construction or operation of the railroad upon the routes and plans adopted, unless such changes are made therein.

This section was derived from the Railroad Law of 1890, § 124, as amended by L. 1892, ch. 676.

Specifying time of completion.—The requirement as to the time for the completion of the road being specified is complied with by a provision that the road shall be completed within a certain time after obtaining the necessary consents, which shall be obtained with all due diligence. New York Cable Co. v. New York, (1877) 104 N. Y. 1, 10 N. E. 332.

Elevated or surface road.—The commissioners must determine the plan of construction, including whether the road shall be elevated, underground or on the surface and the means of transportation to be used, and they cannot leave it for the company to determine whether the road shall be an elevated or a surface one. New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332.

Number of tracks.—The fact that plans provide that the number of tracks shall not exceed two does not render them objectionable as not specifying the number of tracks. Matter of Kings County El. R. Co., (1889) 112 N. Y. 47, 19 N. E. 654.

Location of station.—It has been held that the commissioners have no power to leave the matter of the location and erection of stations to the discretion of the railway company. New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332. But that case was criticized, in this respect, in the subsequent case of Matter of Kings County El. R. Co., (1889) 112 N. Y. 47, 19 N. E. 654, and it was held that where the only alleged defect in plans was that they failed in this respect the plans would not be held defective.

Height and location of columns.—The fact that the plans give the company a discretion between two methods of construction in wide streets, and do not in detail locate the columns in the street, does not render them defective; nor does the fact that while the minimum height from the street is prescribed, the exact height is not specified. Matter of Kings County El. R. Co., (1889) 112 N. Y. 47, 19 N. E. 654.

Failure to include plans in determination.—Where the result of the determination is not stated further than that certain plans were determined upon, which plans are not annexed thereto or filed but are delivered to the corporation on its organization, the statute is not complied with. Lamming v. Galusha, (1894) 81 Hun 247, 30 N. Y. S. 767, affirmed on opinion below (1896) 151 N. Y. 648, 45 N. E. 1132.

Franchise as precluding park.—On the completion of the organization of the corporation it becomes vested with a franchise to construct the railway

on the route fixed by the commissioners and the plan of construction also is fixed in advance for it, so that the lands on the route are impressed with a public use precluding the subsequent taking of the lands for park purposes without express legislative authority, though the railway has not proceeded to acquire title to the lands on its route. Suburban Rapid-Transit Co. v. New York, (1891) 128 N. Y. 510, 28 N. E. 525.

§ 225. Appraisal of damages and deposit of money as security. The commissioners shall, within one hundred and ten days after their organization, ascertain and determine the aggregate pecuniary damage arising from the diminution in the value of the property bounded on that portion of such street or streets, highway or highways, upon which it is proposed to construct and operate such railroad to be caused by the construction and operation thereof. For that purpose they shall view the several parcels of real property so bounded, and shall appraise separately the pecuniary damages arising from such diminution in value of each parcel thereof, and for the purposes of such appraisal they shall give notice of the time and place, when and where they will meet to hear the owners, or persons interested in such real property, which notice shall be published for at least ten days consecutively in at least two newspapers in the county where such railroad is to be constructed, and shall take such material testimony upon the probable diminution in value of any or all such parcels to be so caused as may be offered by or in behalf of any person or party interested therein, and the aggregate sum of the amounts so appraised and determined by them shall be the aggregate pecuniary damage required to be ascertained and determined as above provided. No corporation which shall hereafter be organized under this article shall enter upon any street, highway or lane therein, until it shall first have deposited with some trust company, to be designated by the mayor of the city within which it is proposed to construct the railroad or any part thereof, and by the board of supervisors, when the road does not lie wholly within a city, a sum of money equal to the amount so ascertained and determined by the commissioners to be the aggregate pecuniary damage to such property within the city, or within the county outside of any city, or shall have secured the payment of such amount by depositing with such trust company negotiable securities, equivalent at their par and actual value to such aggregate amount, and approved by the mayor of the city in which such road is wholly or in part located, and by the county treasurer of the county if the road is located wholly or in part outside of the limits of such city. The court may accept in lieu of the deposit of money or securities herein required the bond of the corporation, with two or more sureties, to be approved by the court, to the effect that the corporation before constructing or operating its railroad in front of any premises, shall pay to the owner of the real property all the damages sustained, or which will be sustained by him, as fixed and determined by such commissioners, and the costs allowed, if any.

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Such bond shall be in a sum double the amount of such damages, and the sureties shall justify in the aggregate to an amount equal to the amount of such bond. Such corporation shall also, at the same time, deposit with such trust company or with the county treasurer, as the commissioners may direct, the sum of five thousand dollars in cash, for the payment of the expense of apportioning and distributing such fund. Unless such moneys or securities shall be deposited by such corporation within one year after it shall have obtained the consent of the local authorities, and of the property owners, or the confirmation by the appellate division of the supreme court, of the determination of three commissioners in lieu thereof, and in the case of a corporation organized prior to May eighteenth, eighteen hundred and ninety-two, within one year after it shall have obtained the confirmation by the appellate division of the supreme court of the report of three commissioners in lieu of the consent of property owners, or within one year after the commissioners appointed to ascertain and determine the aggregate pecuniary damages as provided in this article shall have made their report, then such corporation shall be deemed not to have accepted the franchises granted. Where the commissioners shall fix and determine different periods of time within which different sections of such railroad shall be constructed and ready for operation, they shall ascertain, determine, and report separately the aggregate pecuniary damage to property bounded upon that portion of such street or streets upon which each of such sections is located. Upon the deposit by the corporation as above provided of moneys or securities equivalent to the aggregate pecuniary damage to be sustained by any one of such sections, or of any bond given in lieu thereof, it shall immediately be vested with the right and privilege to construct its railroad through such section.

This section was derived from the Railroad Law of 1890, § 125, as amended by L. 1892, ch. 676.

§ 226. Shall prepare certificate of incorporation; proviso as to forfeiture. The commissioners shall prepare an appropriate certificate of incorporation for the corporation in the last section mentioned in which shall be set forth and embodied, as component parts thereof, the several conditions, requirements and particulars by such commissioners determined pursuant to the provisions of this article, and which shall also provide for the release and forfeiture to the supervisors of the county, or if the road is to be constructed wholly or partly within a city, to such city, of all rights and franchises acquired by such corporation in case such railroad or railroads shall not be completed within the time and upon the conditions therein provided; and the commissioners shall thereupon and within one hundred and twenty days after their organization cause a suitable book of subscription to the capital

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stock of such corporation to be opened pursuant to due public notice at a banking office in such county or city. A failure by any corporation heretofore or hereafter organized under this article to complete its railroad within the time limited in and by its certificate of incorporation shall only work a forfeiture of the franchises of such corporation with respect to that portion of its route which such corporation shall have failed to complete, and shall not affect the rights and franchises of such corporation to construct and operate such part of its railroad which it shall have completed within the term prescribed by its certificate of incorporation, or as to which the time for completion shall not have expired, notwithstanding anything to the contrary in its certificate of incorporation.

This section was derived from the Railroad Law of 1890, § 126.

Use of tracks by surface railroad.—A condition that an elevated structure shall not be built in a street already occupied by a surface steam railroad until the corporation shall first enter into an agreement with the surface company transforming its road into a mere street railway and transferring its tracks to the elevated structure, and that on a retransfer of steam trains to the surface the elevated structure shall be removed, is a valid condition which does not invalidate the incorporation. Matter of Atlantic Ave. El. R. Co., (1892) 136 N. Y. 292, 32 N. E. 771.

Time for completion.—The time fixed by the certificate to complete the work does not begin to run until the corporation has been fully incorporated. A certificate providing for a forfeiture for a failure to complete the road within a specified time unless delayed by legal proceedings, etc., "or otherwise," excuses a delay incident to obtaining consents of property owners. Matter of Kings Co. El. R. Co., (1887) 105 N. Y. 97, 13 N. E. 18.

Partial non-completion in time.— Prior to the enactment of the last sentence of this section it was held that a provision in a certificate that on non-completion of the road within the time specified there should be a forfeiture as to the part not completed, did not meet the requirements of the section. New York Cable Co. v. New York, (1887) 104 N. Y. 1, 10 N. E. 332. The omission to prescribe a time for completing some of the routes described in the certificate though invalidating the articles as to such routes does not affect the validity of the incorporation as to other routes. Matter of Kings Co. El. R. Co., (1887) 105 N. Y. 97, 13 N. E. 18.

§ 227. Organization. Whenever the whole capital stock of such corporation or an amount of such capital stock proportioned to the part of such railroad directed by the commissioners to be constructed, shall have been subscribed by not less than fifteen persons, and the fixed percentage of such subscriptions shall have been paid, in cash, the commissioners shall, by written or printed notice of ten days, served personally or by mail, call a meeting of such subscribers for organization, and appoint the inspectors of election to serve thereat. At such meeting, or at any subsequent one to which the same may be adjourned, a majority in number and amount of such subscribers may elect persons, of a number to be theretofore determined by the commissioners not less than nine, who shall be directors for one year of the corporation formed for the purposes of constructing and operating such railroad.

This section was derived from the Railroad Law of 1890, § 127.

Majority generally: see GENERAL CONSTRUCTION LAW, § 41.

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§ 228. Commissioners to deliver certificate; affidavit of directors. Within ten days after the election of such directors the commissioners shall deliver to them a certificate in duplicate, verified by the oath of three commissioners, before a justice of the supreme court, setting forth the certificate of incorporation and the organization of the corporation for the purposes therein mentioned, and within five days after the reception by them of such certificates, three of the directors so elected shall make affidavit in duplicate that the full amount of stock has been subscribed in good faith to construct, maintain and operate the railroad or railroads in such certificate of incorporation mentioned, and such directors shall file such affidavits and certificate in the office of the secretary of state, and a duplicate of the same in the office of the clerk of the county wherein such railroad shall be located; and thereupon the persons who have so subscribed such certificate of incorporation and all persons who shall become stockholders in such corporation shall be a corporation by the name specified in such certificate, and be subject to the duties, liabilities and restrictions of such corporations.

This section was derived from the Railroad Law of 1890, § 128.

§ 229. Powers. Subject to the provisions of the public service commissions law, every such corporation shall have power, in addition to the powers conferred by the general and stock corporation laws and by subdivisions two, five and seven of section eight of this chapter:

1. To take and convey persons and property on its railroad by the power or force of steam or by any motor other than animal power, and to receive compensation therefor.

2. To enter upon and underneath the several streets, avenues and public places and lands designated by the commissioners, and enter into and upon the soil of the same, to construct, maintain, operate and use in accordance with the plan adopted by the commissioners, a railroad upon the route or routes and to the points decided upon and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the railroad constructed upon such plan and for operating the same; and to make such excavations and openings along the route through which such railroad shall be constructed as shall be necessary from time to time. In all cases the surface of the streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be, and any interference with or change in the water mains, or in the sewers or lamp posts, except such changes as may be made with the concurrence of the proper department or authority, shall be avoided; and the use of the

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streets, avenues, places and lands designated by the commissioners and the right of way through the same for the purpose of a railroad, as herein authorized, shall be considered and is hereby declared to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held. No such corporation shall have the right to acquire the use or occupancy of public parks or squares in any such city or county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railroad, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction, and no such railroad shall be constructed across the track of any steam railroad now in actual operation at the grade thereof, nor shall any piers or supports for any elevated railroad be erected upon a railroad track now actually in use in any street or avenue; and no such corporation shall construct a street surface railroad to run in whole or in part upon the surface of any street or highway under the provisions of this article.

This section was derived from the Railroad Law of 1890, § 129.

Traffic arrangements.—A railroad constructed under this article has power to connect with an existing railroad and to make a traffic arrangement under section 148. Gallagher v. Keating, (1899) 27 Misc. 131, 58 N. Y. S. 366, affirmed (1899) 40 App. Div. 81.

Motive power.—The character of an elevated railroad company as being a railroad as distinguished from a street railroad company is not affected by a change from steam to electric motive power. Op. Atty.-Gen (1902) 217.

§ 230. Crossing of horse railroad track. Whenever the route selected by the commissioners for the construction of such railroad shall intersect, cross or coincide with any horse railroad track occupying the surface of the street or avenues, such railroad corporation is hereby authorized to remove, for the purpose of constructing its road, the tracks of such horse railroad; but the same shall be done in such manner as to interfere as little as possible with their practical operation or working, and upon the construction of such railroad, where such removals or changes have been made, the same shall be restored as near as may be to the condition in which they were previous to the construction of such railroad. All such removals and restorations shall be made at the proper cost and charges of such corporation, but no authority is herein given to any such corporation to use the tracks of any horse railroad.

This section was derived from the Railroad Law of 1890, § 130.

§ 231. Where route coincides with another route. Whenever the route or routes determined upon by the commissioners coincide with the route or routes covered by the charter of an existing corporation, formed for the purpose of constructing and operating such a railroad, and it has not forfeited its charter or failed to

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comply with the provisions thereof, requiring the construction of a road or roads within the time therein prescribed, such corporation shall have the like power to construct and operate such railroad upon the fulfillment of the like requirements and conditions imposed by the commissioners as a corporation specially formed under this article, and the commissioners may fix and determine the route or routes by which any elevated steam railroad now in actual operation may connect with other steam railroads or the depots thereof, or with steam ferries, upon making compensation therefor, and in case such corporations can not agree with the owners of such steam railroads, depots or ferries upon the amount of such compensation, and such owners may be entitled to compensation therefor, the amount of such compensation shall be ascertained and paid in the manner prescribed in the condemnation law, and upon fulfillment by such elevated railroad corporation, so far as it relates to such connection, of the requirements and conditions imposed by this article, it shall possess all the powers conferred by section two hundred and twenty-nine of this article, and when any connecting route or routes shall be so designated, such elevated railroad corporation may construct such connection with all the rights and with like effect as though the same had been part of the original route of such railroad.

This section was derived from the Railroad Law of 1890, § 131, as amended by L. 1892, ch. 676.

Constitutionality.—This section is not unconstitutional, so far as it grants rights to existing companies, as granting an exclusive franchise or privilege, or as being a private or local bill, or as authorizing the taking of property without compensation, for the company is required to make compensation. Matter of New York El. R. Co., (1877) 70 N. Y. 327; Gilbert El. R. Co. v. Anderson, (1877) 3 Abb. N. Cas. 434.

Liability as to connecting routes.—The last clause in this section does not impose on a company constructing a connecting route all the burdens to which it is subjected as to its original route, so that it is under no duty to pay the percentage of its profits on such line that exists as to its original line. New York v. Manhattan R. Co., (1894) 143 N. Y. 1, 37 N. E. 494.

§ 232. Commissioners to transfer plans. Within one month after such corporation shall have been formed and organized in the manner hereinbefore provided, the commissioners shall transfer and deliver to the corporation all plans, specifications, drawings, maps, books and papers in their possession, and they shall, within the like period of one month after the organization of such corporation, cause to be paid to the treasurer thereof all money collected under the provisions of this article, after deducting therefrom the necessary expenses incurred by the commissioners and the amounts due to them for their salaries.

This section was derived from the Railroad Law of 1890, § 132.

§ 233. Commissioners to file report; confirmation thereof. The commissioners shall within one hundred and forty days

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after their appointment, make a report to a special term of the supreme court of the department in which such railroad may be located, of the amount of the pecuniary damages arising from the diminution of value of each parcel of property bounded on that portion of the street or streets, highway or highways, upon which it is proposed to construct such railroad or railroads, which will be caused by the construction, maintenance and operation thereof. The name and place of residence of the owner or owners of each parcel shall be stated if the same are known, or can be ascertained, and if not known the name of the person or persons appearing by the certificate of the clerk or register of the county to have the title thereto from the records in his office, and a specific description of each parcel of property with reasonable certainty. The testimony, if any, taken by the commissioners as to the amount of such damage, shall accompany their report. Within thirty days after filing and recording its certificate of incorporation, the corporation authorized to construct and operate such railroad or railroads shall move to confirm such report by giving notice of such motion to the property owners in the manner in which notice of the time and place of hearing before the commissioners is required by section two hundred and twenty-five of this article to be given, and if the corporation fails to so move, any property owner may make the motion; and thereafter the proceedings shall be conducted in the manner prescribed in the condemnation law.

Before constructing and operating its railroad in front of any real property bounded upon any street, avenue or public place wherein the corporation is authorized by the certificate and report of the commissioners to construct and operate its road, such corporation shall pay to the owner of the real property the damages sustained or which will be sustained by him in consequence thereof, as finally fixed and ascertained, and the costs allowed him, if any, and the court may direct that such damages be paid out of the moneys deposited pursuant to the provisions of section two hundred and twenty-five of this article, or in case negotiable securities shall have been deposited in lieu of money, that so much of such securities shall be sold as may be necessary to raise the amount required to be paid to such owner for damages and costs if any. If a bond shall have been executed in lieu of such deposit, the court may order the sureties in such bond to pay the damages so fixed and ascertained, and in default thereof may cause them to be proceeded against and punished as for a contempt of court.

This section was derived from the Railroad Law of 1890, § 133, as amended by L. 1892, ch. 676.

Deposit.— It has been held that a report in favor of an elevated railway should not be confirmed where no provision is made for a deposit to secure the damages of abutting owners. Matter of East River, etc., Co., (1882) 10 Abb. N. Cas. 245.

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§ 234. Pay of commissioners. Each of the commissioners shall be paid for his services at the rate of ten dollars per day for each day of actual service as such commissioner, and all expenses necessarily incurred by him in the discharge of his duties, to be paid by such corporation, but if a sufficient amount of capital stock shall not be subscribed within one year after the appointment of such commissioners to authorize the formation of such corporation, the commissioners shall receive no salary, and shall cause to be returned to the subscribers for such stock the amounts paid in by them, after deducting therefrom the necessary expenses incurred by the commissioners, but the time, if any, unavoidably consumed by the pendency of legal proceedings shall not be deemed a part of any period of time limited by this article.

This section was derived from the Railroad Law of 1890, § 134.

§ 235. Quorum; term of office; removal; vacancies in board of commissioners. A majority of the members of any board of commissioners appointed under this article shall be a quorum for the transaction of any business or the performance of any duty or function, or the exercise of any power, conferred or enjoined upon them. Any commissioner may be removed for cause at any time by the power appointing him, but no commissioner shall be removed without due notice and an opportunity to be heard in defense; and no commissioner thus removed is or shall be eligible to be again appointed to the office of commissioner. In case of the death, resignation or removal from office of any commissioner the vacancy shall be filled by the power appointing him, within thirty days after such removal, or within thirty days after notice in writing to such appointing power given by some member of the board, or by the corporation hereinafter mentioned, of such death or resignation, and a certificate of every such appointment shall be filed as hereinbefore required. Except as otherwise provided by law, the terms of office of the commissioners shall determine and expire with the performance of their functions as hereinabove prescribed.

This section was derived from the Railroad Law of 1890, § 135.
Quorum generally: see GENERAL CONSTRUCTION LAW, § 41.
Creation and filling of vacancies: see PUBLIC OFFICERS LAW, § 30 et seq.
Reconvening to cure defects.— By virtue of this section where commissioners have performed all the duties required of them their functions cease and they cannot subsequently meet and cure defects in the organization of the corporation. Matter of New York Cable R. Co., (1888) 109 N. Y. 32, 15 N. E. 882, affirming 45 Hun 153, 9 N. Y. St. Rep. 836.

§ 236. Abandonment or change of route; new commissioners; their powers and proceedings. Any corporation heretofore organized or hereafter to be organized under this article, its successor or assigns, which shall have constructed or put in operation a railroad upon a part and not upon the whole of the route

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fixed, determined and located for such railroad by a board of commissioners, may at any time apply for authority to abandon any portion of the route upon which the railroad shall not have been theretofore constructed or shall not then be in operation, with or without a change and relocation of such portion, and with or without extension of the portion not abandoned, or of any part thereof. Such application shall be made by petition in writing, addressed by such corporation to the board of supervisors of the county in which such portion of the route so desired to be changed or abandoned shall be situated, which is not within the limits of any city, or if such route, or any part thereof, shall be within the limits of a city, to the mayor of the city, for the route or portion thereof within such city. Five commissioners may be appointed pursuant to such an application as hereinafter provided, who shall be residents of the county or city and who shall have full power as herein provided. When such application is made by a corporation heretofore organized such commissioners may be appointed within thirty days after presentation of the same by such board of supervisors, or, as the case may be, by such mayor. When such application is made by a corporation hereafter to be organized under this article, such board of supervisors, or, as the case may be, such mayor, may within thirty days after presentation of such application, indorse thereon their or his approval and direction that it may be presented to the supreme court in the manner provided in section two hundred and twenty of this article, and such court may thereupon appoint such commissioners. Within ten days after his appointment each commissioner so appointed shall take, subscribe and file the oath and give and file the bond prescribed by section two hundred and twenty-one of this article; and if any one so appointed shall not comply with this requirement, he shall be deemed to have declined to accept such appointment, and to have made a vacancy which the appointing power shall fill by another appointment as herein provided. Within fifteen days after such appointments shall have been so made, the commissioners shall meet at some convenient place in such county and complete their organization as a board with appropriate officers. Such board shall have all the authority conferred by law upon commissioners appointed, or authorized to be appointed under this article. Before proceeding to hear the application of the corporation, the board shall give such public notice as it may deem most proper and effective of the time and place of the hearing. Within thirty days after completing their organization such board shall hear the application of the corporation, and all parties who may be interested therein, and within sixty days after their organization they shall determine whether any part of such route should be authorized to be abandoned, or should be changed and relocated with or without extension or extensions. If the board shall determine that no abandonment of

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any part of the route should be allowed, and that no change and relocation of any part thereof should be effected, and that no extension should be made, the board shall dismiss the application. If the board shall determine that an abandonment of any portion of the route should be allowed, or that any change therein or extension thereof should be made, the board shall proceed to authorize and require the same upon such conditions as to the board shall seem proper, and with or without extension of the remainder of the route or of any part thereof, by fixing, determining and locating the route or routes of the extension or extensions, if any, and by directing the abandonment of the part of the route theretofore located, but by the board allowed to be abandoned, if any, and by fixing, determining and relocating the part of the route theretofore located, but by the board changed, if any; and the board shall cause to be made in duplicate a survey and map of the route as so changed and fixed, determined and located. Neither such corporation nor any assign or successor thereof shall thereafter have any authority, by reason of anything done under this article, to operate or construct any railroad upon any portion of the route by the board so required to be abandoned. The board shall also fix and determine the time within which the railroad by it authorized and required upon any portion of the route so changed, shall be reconstructed and ready for operation. If the railroad on any portion of the route not by the board changed or allowed to be abandoned, shall not have been theretofore constructed and made ready for operation, the board may extend, and fix and determine anew the time within which such railroad shall be completed, but such extension of time shall not be for a longer period than that originally allowed by law for the completion thereof. If the board shall have determined that any portion of the route theretofore located should be allowed to be abandoned, with or without a change or relocation thereof or any part thereof, and with or without extension, or if the board shall have extended the time within which such railroad shall be completed, the board shall make a report in writing in accordance with the determination so made, describing the portion of the route, if any there be, as so fixed, determined and located anew, and the part, if any there be, of the route allowed to be abandoned, and stating the period of time, if any, by the board fixed and determined within which such corporation shall construct and complete the railroad theretofore authorized or by it authorized to be constructed, and prescribing that a failure by the corporation, its successors or assigns, to complete it within the time, if any, so limited, shall work a forfeiture to the supervisors of the county if no part of the road is within a city, or in any city, to such city, of the rights and franchises of such corporation with respect to that portion of the route so fixed, determined and located anew, and with respect to the then authorized extension or extensions, if

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any there be of said route, upon which a railroad shall not be constructed within the time so limited; but the time, if any, unavoidably consumed by the pendency of legal proceedings, shall not be deemed a part of any period of time limited in this article, and any recital of any forfeiture of any of the rights or franchises prescribed by any commissioners heretofore appointed, to be to the mayor, aldermen and commonalty of the city of New York, shall be as effectual for any and all purposes as if such forfeiture had been in terms recited to be to the board of supervisors of the county of New York. Such report shall be signed in duplicate by at least a majority of the then members of the board, and there shall be thereto annexed the survey and map as hereinbefore directed, showing the line and location of each and all the routes, with or without the extension or extensions, as fixed, determined and located, and showing also the parts or part, if any there shall be, of the route or routes as theretofore fixed, determined and located, but by the board allowed to be abandoned. Within ten days after so signing such report the board shall cause the same to be filed in the office of the secretary of state, and the duplicate thereof in the office of the clerk of the county wherein such railroad shall be located; and thereupon the corporation making such application, its successors or assigns, is and shall be authorized to construct, maintain and operate a steam railroad for the transportation of passengers, mail and freight, upon the route or routes so fixed, determined and located, and in said report described, but the construction or operation of a railroad upon any new location or selection of route is not and shall not be thus authorized except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, that the determination of three commissioners, to be upon application appointed by the appellate division of the supreme court in the department in which such railroad is proposed to be constructed, be given after a hearing of all parties interested that such railroad ought to be constructed or operated, which determination, confirmed by the court, may be taken in lieu of the consent of the property owners. Such corporation is and the successors and assigns thereof shall be authorized to maintain and operate all the railroads and the appurtenances thereof by it or them theretofore constructed upon any portion of a route or routes which shall have been located by commissioners under this article, and to complete within the time in and by such report so extended, fixed and determined anew, and thereafter to maintain and operate, the railroad and the appurtenances, upon so much of the route or routes theretofore fixed, determined and located as shall not have been so authorized

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and required to be abandoned, and with the same rights and effect, in all respects, as if such extended period of time had been originally fixed and determined, and in the original certificate of incorporation of such corporation recited, for completing such railroad and putting it in operation. The other terms and conditions in and by such certificate mentioned and prescribed, except as the same are hereinbefore modified or may be modified by the board as hereinbefore authorized, shall apply to the railroad herein authorized to be constructed and operated upon the route or routes as so changed, fixed, determined and located, with the same force and effect as if such route or routes, as finally so changed and located, had been in and by such articles or certificates themselves prescribed. If a new location or extension of routes shall be fixed and determined by commissioners who shall have been appointed by the court pursuant to this section, they shall also ascertain and determine the aggregate pecuniary damages arising from the diminution of value of the property bounded on that portion of the street or highway upon the line of such new location or extension and of each parcel of real property so bounded, and their proceedings thereupon shall be conducted in the same manner and upon the like notice as the proceedings for that purpose before the commissioners specified in section two hundred and twenty-five and they shall make to the supreme court the report required by section two hundred and thirty-three, and thereupon the same proceedings shall be had as are provided for in such last named section. Each commissioner shall be paid for his services at the rate of ten dollars per day for each day of actual services as such commissioner, and all reasonable expenses incurred by him in or about any of the matters referred to such board, to be paid by the corporation making the application so heard and determined. No corporation shall be authorized under this section to extend, abandon or change the location of its route, or any part thereof, where the greater portion of the route or routes is or shall be in that portion of the city of New York south or west of Harlem river, or of any route or part thereof in the borough of Brooklyn or county of Kings, or to construct, extend, abandon or change the location of any railroad or route for a railroad over, under, through or across any street, avenues, place or lands south of One Hundred and Twenty-eighth street or west of Third avenue in that portion of the city of New York south or west of Harlem river, or where a railroad might not by law be constructed, or was not by law authorized to be by a board of commissioners located on the fifth day of June, eighteen hundred and eighty-eight.

This section was derived from the Railroad Law of 1890, § 136, as amended by L. 1892, ch. 676.

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§ 237. Abandonment of portion of route by elevated railroad. Any company operating an elevated railroad or railroads in any city of this state for the transportation of passengers, mails or freight, and which, prior to the twenty-ninth day of April, eighteen hundred and ninety-one, shall have built and operated sixtenths of its route as set forth and embodied in its articles of incorporation, may declare relinquished and abandoned any portion of its said route, which it may deem no longer necessary for the successful operation of its road and the convenience of the public. Such declaration of abandonment to be valid shall be adopted by the board of directors, under the seal of such company, and shall be submitted to the stockholders thereof at a meeting called for the purpose of taking the same into consideration. Due notice of the time and place of holding said meeting and stating the object thereof shall be given by the company to its stockholders by written or printed notices addressed to each of the persons in whose name the capital stock of the company stands on the books thereof, at the address of such persons as stated on the books, or as known to the secretary of the company, and delivered or mailed to such persons, or the legal representatives of such persons, respectively, at least thirty days before the time of holding the meeting of such company, and also by a general notice published daily for at least four weeks in some newspaper last designated for the publication of the session laws or of judicial proceedings and legal notices in the county where the route of such company is located; and at the said meeting of stockholders the declaration of the said directors shall be considered and a vote by ballot taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and said ballots shall be cast in person or by proxy, and if two-thirds of all the votes of the stockholders cast in person or by proxy at said meeting shall be for the adoption of said declaration of abandonment, then that fact shall be certified thereon by the secretary of the company under the seal thereof, and the declaration so adopted shall be submitted for approval to the public service commission, and if approved by it, such approval shall be indorsed thereon, and the said declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the time of such filing such portion of said route designated in such declaration of such company shall be deemed to be abandoned. A copy of such declaration of abandonment, duly certified by the secretary of state under his official seal, shall be presumptive evidence in all courts and places of the facts which it recites, and of the regularity of the proceedings resulting in such abandonment.

This section was derived from L. 1891, ch. 294, § 1.

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§ 238. Increased deposit, when and how required. In case any of the securities deposited in lieu of money as provided in section two hundred and twenty-five, shall in the opinion of the county treasurer or trust company with whom they may be deposited, fall below their actual value at the time of deposit, the county treasurer or trust company shall call upon such railroad corporation to substitute therefor other securities equivalent at their par or market value to the amount in lieu of which the securities for which they are to be substituted were deposited, and in case such other securities shall not be furnished, the county treasurer or trust company shall call upon such corporation to furnish as a substitute, and it shall so furnish an amount of money equal to the amount in lieu of which the securities first above referred to were deposited.

This section was derived from the Railroad Law of 1890, § 137.

§ 239. Trains to come to full stop. All trains upon elevated railroads shall come to a full stop before any passenger shall be permitted to leave such trains; and no train on such railroad shall be permitted to start until every passenger desiring to depart therefrom shall have left the train, provided such passenger has mainfested his intention to so depart by moving toward or upon the platform of any car; nor until every passenger upon the platform or station at which such train has stopped, and desiring to board or enter such cars, shall have actually boarded or entered the same, but no person shall be permitted to enter or board any train after due notice from an authorized employee of such corporation that such train is full and that no more passengers can be then received.

This section was derived from the Railroad Law of 1890, § 138.

Misconduct of officials or employees on elevated railroads: see PENAL LAW, § 1983.

Duty to look for intending passengers.—An instruction is too broad which tells the jury that it is presumptive negligence for the conductor on an elevated train to start his train without using ordinary care to discover if any person upon the platform within the range of his vision is approaching to board the train, as this would include persons about to purchase tickets, etc., and in any event a mere violation of the statute is not presumptive negligence as a matter of law. Brown v. Manhattan R. Co., (1905) 105 App. Div. 395, 94 N. Y. S. 190.

Closing gate.— Continuing this section in connection with section 240 it is evident that after a conductor has closed the gates and before the train has actually started he is under no duty to open the gates and admit one whom he sees approaching with intent to become a passenger. Lauterer v. Manhattan R. Co., (1904) 128 Fed. 540, 63 C. C. A. 38. However, the mere fact that the conductor is engaged in closing the gate on a train is not notice that the car is full so as to deprive an intending passenger of the right to board the same. Wehn v. Interborough Rapid Transit Co., (1909) 132 App. Div. 841, 117 N. Y. S. 731.

Boarding train after gate closed.—The provision requiring that the train shall not be started until all intending passengers have boarded the same does not relieve an intending passenger from the imputation of negligence in boarding a train after the gate has been closed. Hills v. Interborough Rapid Transit Co., (1917) 176 App. Div. 754, 163 N. Y. S. 1010.

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Starting train before passenger alights.—Where a passenger arises as a train stops and proceeds toward the door this is notice of his intention to alight and the guard will be presumed to have seen him, or will be deemed negligent in not seeing him, and starting the train under such circumstances is evidence of negligence. Frauhauf v. Interborough Rapid Transit Co., (1906) 52 Misc. 135, 101 N. Y. S. 781.

§ 240. Gates or vestibule doors. Every car used for passengers upon elevated railroads shall have gates at the outer edge of its platforms so constructed that they shall, when opened, be caught and held open by such catch or spring as will prevent their swinging and obstructing passengers in their egress from or ingress to such cars, or vestibule doors so constructed as to slide into the body of the car; and every such gate or door shall be kept closed while the car is in motion; and when the car has stopped and a gate or door has been opened, the car shall not start until such gate or door is again firmly closed.

This section was derived from the Railroad Law of 1890, § 139, as amended by L. 1903, ch. 273, § 1.

Starting before closing gate.—It seems that even though a conductor or guard has started to close the gate on a train this does not operate to deprive an intending passenger of the right to board the train, which should not be started until after the gate has been fully closed. Wehn v. Interborough Rapid Transit Co., (1909) 132 App. Div. 841, 117 N. Y. S. 731.

Running with gates open.—A violation of the requirement that gates shall be closed while the train is in motion is evidence of negligence. Graham v. Manhattan R. Co., (1896) 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. 305, 28 N. Y. S. 739. But while this is true there can be no recovery for injuries suffered unless proximately caused thereby, and where a person attempted to board the train while in motion and was injured because of such motion it seems that his negligence bars a recovery. Fahr v. Manhattan R. Co., (1894) 9 Misc. 57, 29 N. Y. S. 1.

§ 241. Penalty for violation of two preceding sections. Any elevated railroad corporation that shall fail or neglect to comply with or enforce the provisions of the two preceding sections, shall upon the petition of any citizen to any court of record, and upon due notice to such corporation, and proof of such failure or neglect, pay to the clerk of the court wherein such petition was made, a sum not less than two hundred and fifty nor more than one thousand dollars, as such court may direct by its order. The sum so ordered to be paid shall be paid by such clerk of the court to the county treasurer, and shall be distributed by such treasurer equally among the public hospitals of the county in which the proceeding is had, at such time as the board of supervisors or board of aldermen in any such county shall direct. Nothing in this section shall relieve elevated railroad corporations from any liability under which they may now be held by existing laws for damages to persons or property.

This section was derived from the Railroad Law of 1890, § 140, as amended by L. 1892, ch. 676.

Violation as misdemeanor.— Under a former statute a violation of section 240 was a misdemeanor but this was held not to deprive a passenger of the

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right to assume that it was safe for him to alight when the guard opened the gate while the train was in motion and directed him to alight. Geiler v. Manhattan R. Co., (1895) 11 Misc. 413, 32 N. Y. S. 254.

§ 242. Sections to be printed and posted. The officers and board of directors of such railroad corporations shall cause copies of sections two hundred and thirty-nine, two hundred and forty and two hundred and forty-one to be printed conspicuously and posted in the depots or stations and in each car belonging to them.

This section was derived from the Railroad Law of 1890, § 141.

§ 243. Extension of time. The time within which any act is required to be done under the foregoing sections of this article may be extended by the supreme court for good cause shown, for one year, and but one extension will be granted. Any company that has heretofore constructed or is now operating an elevated railroad shall be deemed to have been duly incorporated notwithstanding any failure on the part of commissioners to insert in its articles of association provisions complying with statutory requirements relative to such articles.

This section was derived from the Railroad Law of 1890, § 142, as added by L. 1892, ch. 676.

§ 244. Lighting cars on elevated railroads in cities of over twelve hundred thousand inhabitants. Every corporation operating an elevated railroad in any city of over twelve hundred thousand inhabitants in this state, computed according to the state enumeration had in eighteen hundred and ninety-two, shall equip all cars used for the transportation of passengers with the most approved system of lighting passenger cars now in use upon railroads, either by electricity or gas of not less than eighteen candle power, and every such corporation is prohibited from using kerosene or coal oils as a means of lighting any of its passenger cars. Any violation of the provisions of this section shall render any such corporation liable to pay a fine or penalty of fifty dollars for each and every day, for each and every passenger car run over its railroad which is not equipped and lighted as provided herein; and such fine may be recovered by any passenger on such railroad who may sue therefor; and any violation of the provisions of this section on the part of any such railroad corporation shall also be a misdemeanor.

This section was derived from L. 1896, ch. 388, §§ 1, 2.

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ARTICLE 7

Laws Repealed; When to Take Effect

Section 250. Laws repealed.
251. When to take effect.

§ 250. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 251. When to take effect. This chapter shall take effect immediately.

Schedule of Laws Repealed.

Laws of	Chapter	Section
1834.....	249.....	20
1834.....	311.....	All
1835.....	300.....	All
1836.....	316.....	All
1838.....	160.....	All
1838.....	161.....	All
1839.....	218.....	All
1845.....	149.....	All
1845.....	230.....	All
1846.....	155.....	All
1846.....	215.....	17, 18
1847.....	100.....	3–5
1847.....	222.....	All
1847.....	270.....	All
1847.....	272.....	All
1847.....	404.....	All
1847.....	405.....	All
1848.....	140.....	All
1849.....	271.....	All
1849.....	434.....	All
1850.....	140.....	All
1851.....	19.....	All
1851.....	497.....	All
1853.....	53.....	All
1853.....	62.....	All
1854.....	140.....	All
1854.....	282.....	All
1855.....	302.....	All
1855.....	478.....	All
1855.....	526.....	All

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Laws of	Chapter	Section
1857.....	185.....	All
1857.....	444.....	All
1858.....	125.....	All
1862.....	449.....	All
1863.....	346.....	All
1864.....	582.....	All
1865.....	246.....	All
1866.....	259.....	All
1866.....	697.....	All
1866.....	798.....	All
1867.....	4.....	All
1867.....	49.....	All
1867.....	254.....	All
1867.....	368.....	All
1867.....	483.....	All
1867.....	515.....	All
1867.....	775.....	All
1867.....	793.....	All
1867.....	906.....	All
1868.....	573.....	All
1869.....	237.....	All
1869.....	607.....	1
1869.....	844.....	All
1869.....	917.....	All
1871.....	560.....	All
1871.....	669.....	All
1872.....	81.....	All
1872.....	350.....	All
1872.....	612.....	3
1872.....	829.....	All
1872.....	843.....	All
1873.....	352.....	All
1873.....	432.....	All
1873.....	710.....	All
1874.....	240.....	All
1874.....	430.....	All
1875.....	108.....	All
1875.....	193.....	All
1875.....	256.....	All
1875.....	586.....	All
1875.....	598.....	All
1875.....	606.....	All
1876.....	77.....	All
1876.....	198.....	All
1876.....	446.....	All
1877.....	103.....	All
1877.....	224.....	All

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L. 1910, ch. 481 Schedule of Laws Repealed

Laws of	Chapter	Section
1878.....	261.....	All
1879.....	293.....	All
1879.....	350.....	All
1879.....	395.....	All
1879.....	415.....	All
1879.....	503.....	All
1879.....	505.....	All
1879.....	541.....	All
1880.....	5.....	All
1880.....	94.....	All
1880.....	133.....	All
1880.....	155.....	All
1880.....	223.....	All
1880.....	267.....	All
1880.....	349.....	All
1880.....	415.....	All
1880.....	417.....	All
1880.....	575.....	All
1880.....	582.....	All
1880.....	583.....	All
1881.....	148.....	All
1881.....	296.....	All
1881.....	317.....	All
1881.....	338.....	All
1881.....	399.....	All
1881.....	452.....	All
1881.....	468.....	All
1881.....	470.....	All
1881.....	485.....	All
1881.....	649.....	All
1881.....	685.....	All
1882.....	82.....	All
1882.....	140.....	All
1882.....	273.....	2
1882.....	349.....	All
1882.....	353.....	All
1882.....	393.....	All
1882.....	405.....	All
1883.....	46.....	All
1883.....	381.....	All
1883.....	382.....	All
1883.....	384.....	All
1883.....	386.....	All
1883.....	387.....	All
1883.....	388.....	All
1884.....	193.....	All
1884.....	223.....	All

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Laws of	Chapter	Section
1884.....	252.....	All
1884.....	421.....	All
1884.....	422.....	All
1884.....	439.....	All
1884.....	441.....	All
1884.....	444.....	All
1885.....	305.....	All
1885.....	369.....	All
1885.....	498.....	All
1885.....	530.....	All
1886.....	65.....	All
1886.....	271.....	All
1886.....	403.....	All
1886.....	415.....	All
1886.....	509.....	All
1886.....	551.....	All
1886.....	601.....	All
1886.....	605.....	All
1886.....	634.....	All
1886.....	642.....	All
1887.....	536.....	All
1887.....	616.....	All
1887.....	622.....	All
1887.....	724.....	All
1888.....	189.....	All
1888.....	514.....	All
1888.....	549.....	All
1888.....	560.....	All
1889.....	38.....	All
1889.....	76.....	All
1889.....	78.....	All
1889.....	236.....	All
1889.....	242.....	All
1889.....	281.....	All
1889.....	426.....	All
1889.....	524.....	All
1889.....	531.....	All
1889.....	532.....	All
1889.....	564.....	All
1890.....	98.....	All
1890.....	421.....	All
1890.....	483.....	All
1890.....	543.....	All
1890.....	565.....	1–141, 180–183
1891.....	267.....	All
1891.....	294.....	All
1891.....	360.....	All

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L. 1910, ch. 481 Schedule of Laws Repealed

Laws of	Chapter	Section
1891.....	362.....	All
1891.....	367.....	All
1892.....	306.....	All
1892.....	425.....	All
1892.....	460.....	All
1892.....	532.....	All
1892.....	604.....	All
1892.....	676.....	All, except part amending L. 1890, ch. 565, § 162
1892.....	700.....	All
1892.....	702.....	All
1893.....	225.....	All
1893.....	238.....	All
1893.....	239.....	All
1893.....	316.....	All
1893.....	433.....	All
1893.....	434.....	All
1893.....	543.....	All
1893.....	544.....	All
1893.....	546.....	All
1893.....	679.....	All
1894.....	648.....	All
1894.....	693.....	All
1894.....	723.....	All
1895.....	454.....	All
1895.....	513.....	All
1895.....	545.....	All
1895.....	700.....	All
1895.....	921.....	All
1895.....	933.....	All
1895.....	1027.....	All
1896.....	299.....	All
1896.....	333.....	All
1896.....	356.....	All
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